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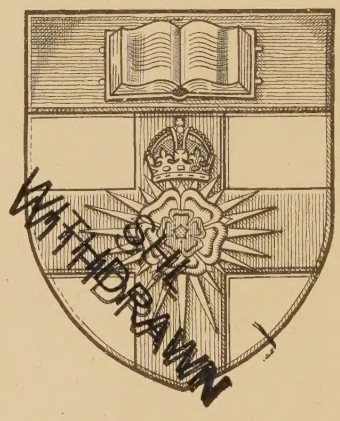

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REPARATION AND THE ENGLISH TORT OF NEGLIGENCE

QUESTIONS of classification and legal principle may seem remote from the day-to-day problems confronting the practitioner, but they can have a practical significance. Moreover it is the underlying principles of any legal system that enable it to develop systematically and the future decisions of its courts to be capable of reasonable prediction. Without classification and legal principles case law becomes an unchartable ocean.

The purpose of this article is to consider whether there is now any difference in principle and classification between the Scots and English laws of negligence, and if so what is its significance to the practitioner. Such a consideration must inevitably commence with a brief survey of the historical origins of this branch of law in the two countries.

The origin of the Scottish law of negligence is to be found in that branch of the law of Reparation involving *culpa* or breach of duty as opposed to *dolus* or malice. This twofold division of the law of actionable wrong is no doubt derived from Roman sources through Continental influences, so that when Erskine wrote his Institutes he could clearly state that "wrong may arise not only from positive acts of trespass or injury, but from blameable omission or neglect of duty." (*Erskine's Inst.* III. 1. 13.) It is this second branch of the law of Reparation which is now called Negligence and has been so classified in *Guthrie Smith* and *Glegg on Reparation*. Originally it was confined within narrow limits and the courts were slow to define the duties a breach of which involved liability. But with recent times there

has followed a multitude of decisions to illustrate under changing social conditions what constitutes a breach of duty to take care. As Lord Macmillan observed in *Donoghue* v. *Stevenson*, 1932 S.C. (H.L.) 70; 1932 S.L.T. 317, "the grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side to a duty to take care, and, on the other side, to a right to have care taken." Lord Macmillan here confirms the basis of liability as *culpa* but is reluctant to give a comprehensive definition of when the duty (breach of which involves *culpa*) arises, beyond saying in his same judgment that "the law can only refer to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to one another." The standards of the reasonable man, now common to Scottish and English law, have been defined in various ways and one may choose a further definition of Lord Macmillan in *Bourhill* v. *Young*, 1942 S.C. (H.L.) 78, 88; 1943 S.L.T. 105. "The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable or probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed." It may be added that all the duties for which defenders have

been held liable in Scotland do not exactly fall within this liberal definition, and there has been a tendency under English influence to categorise certain types of duty as, *e.g.*, in *Dumbreck* v. *Addies' Collieries*, 1929 S.C. (H.L.) 51; 1929 S.L.T. 242.

The English law of negligence springs from no cardinal principle of liability, whether derived from a Roman or any other source, and far from the grounds of action being originally as various and manifold as human errancy, the law was categorised by its procedural forms of action. These forms all had their appropriate writs, the courts in each case deciding whether any given set of facts fitted into any and which of these forms of action. There was however no form of action giving a comprehensive remedy for *culpa* or breach of duty to take care, though it must be added that two writs known as " Trespass " and " Case " provided remedies for most forms of action that would now be categorised as " negligence ". It is with the abolition of these old procedural forms of action, however, that the English law of negligence begins to assume its present shape. In 1852 the Common Law Procedure Act provided that it would no longer be necessary to mention any form or cause of action in any writ of summons, thereby introducing a method of pleading analagous to what has always been the Scottish form since stereotyped writs on the English pattern were abolished in 1532. With no further mention of " Trespass " or " Case " the Right no longer required to follow the remedial form of action and consequently depended on conceptions of Duty. The subsequent decisions of the English courts therefore illustrate a preoccupation with problems of Duty and a constant searching for a comprehensive conception of liability to interconnect existing case law and upon which its future development could be founded. Perhaps the best known of such broad conceptions are those of Brett M.R. in *Heaven* v. *Pender* (11 Q.B.D. 503, 509): " Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did

think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" ; and the broad conception of neighbourly duty formulated by Lord Atkin in *Donoghue* (S.C. at p. 44) which he prefaced by saying : " In England there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of *culpa*, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay" ; and then he continued to state his well-known conception of neighbourly duty : " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Donoghue was a Scottish appeal but it was conceded that it might be decided on principles of law that were common to both countries, Lord Macmillan being satisfied that in this sphere they were in no way at variance. Following these common principles the House of Lords then decided the extent of the duty owed by manufacturers of products to the ultimate consumer. What are these common principles? The answer seems to be some general conception of moral wrongdoing that finds its legal expression in the standards of the reasonable man ; and the standards required are in some cases more stringent than in others. The extent of the duties decided upon in different cases thus forms a body of precedent that is practically common to both countries and *culpa* becomes synonymous with negligence. It does not indeed define the duty owed by one person to

another, but expresses the breach of duty whose extent is now defined by the standards of the reasonable man. Thus it is possible for Scottish practitioners to use Beven's and Charlesworth's English textbooks on *The Law of Negligence*, because these recognise the same basis of liability as Scots law, and adopt the same classification of derivative duties as Clegg in his book on *Reparation* under the heading of "Negligence," and the learned author of the article of that name in *The Encyclopaedia of the Laws of Scotland*.

But something very remarkable has happened since *Donoghue* the full effects of which have perhaps not been fully appreciated this side of the Border. Or perhaps this happening is not so remarkable when we bear in mind the influence of historical traditions upon the contemporaneous approach to legal and other problems. Owing to the historical influences of the abolished common law procedure, English law after 1852 still knew no general principles of tortious liability, but only a law of specific torts, adaptable indeed and capable of extension, but into whose separate categories the circumstances of each case still tended to be pigeon-holed. As Maitland observed; "The forms of action we have buried but they still rule us from their graves." In respect of negligence we may now wonder whether one corpse has not been resurrected from the tomb. For English textbook writers have recently reclassified negligence as a separate tort. Favouring, in historical fashion, a law of separate torts rather than principles of tortious liability, they now take the broad principles formulated by Brett M.R. and Lord Atkin (*supra*) to be the definition of a new tort of negligence and call Lord Atkin's wide dictum "the first rule in *Donoghue* v. *Stevenson*" (defining the tort of negligence); and his *ratio decidendi*, "the second rule in *Donoghue* v. *Stevenson*" (defining a branch of tortious liability for dangerous chattels). This categorising into separate torts would not matter particularly, if within the ambit of this new tort of negligence were included all those particular duties flowing from the principle of *culpa*

and included in Beven's classification. But they do not appear to be so included. The tort of negligence appears established as an entirely separate chapter of the law, quite distinct from the duties owed by the manufacturers of products or the occupiers of premises. Thus in the recent edition (5th ed., 1950) of Sir Percy Winfield's textbook, these are treated as three distinct torts and the learned author says (p. 402) that at the present day negligence has two meanings:—

> "(1) a mental element which is to be inferred from one of the modes in which some (but by no means all) torts may possibly be committed. . . . (2) an independent tort which consists of breach of a legal duty in the mode described above, followed by damage."

The learned authors of the recent editions of *Salmond* and *Pollock* (10th ed., 1945, and 14th ed., 1950) have now adopted a similar classification. In *Clerk and Lindsell* (10th ed., 1947) the author of the chapter on negligence says (p. 341):—

> "In the earliest editions of this work there was no chapter on the subject of negligence. This was due, no doubt, to the fact that it has only recently been recognised as a separate tort and it has been the fashion to treat the subject rather as an element in liability for tort than an independent cause of action."

It may be added that Beven has not been re-edited since 1928 and his mantle has now been assumed by Charlesworth who still retains his old classification.

The practical effect, however, of this reclassification by other textbook writers, if accepted by the courts, appears to be that liability of a defender for negligence, may now come from more than one quarter. For instance, by invoking a new tort of negligence an invitee may now succeed in making an invitor liable who might formerly have sheltered behind those duties imposed on occupiers of premises that in Scots law are particular illustrations of the general principle of liability. It need hardly be said that if the House of Lords

were to admit such an innovation it would completely confuse Scottish principles. Such an innovation has in fact recently been canvassed in the English appeal of *Horton* v. *London Graving Dock* [1950] 1 K.B. 421 (C.A.) and [1951] A.C. 737. This case made an important decision regarding the particular duties owed by invitors towards their invitees. But we are here only concerned with their Lordships' reactions to the second branch of argument presented on behalf of an invitee (the employee of sub-contractors), that the occupiers of premises on which he had been injured were under additional duties towards him to those usually incumbent on invitors towards invitees injured through defects in the premises. This additional duty was founded on the separate tort of negligence as supposed to be propounded by Lord Atkin in the " first rule in *Donoghue* v. *Stevenson.*" In the Court of Appeal Singleton L.J. seems to have accepted this argument when he said (p. 430) " It remains for me to consider the other ground on which the plaintiff's case is put. It was said that, as the defenders knew that the staging was to be used by the sub-contractor's men, of whom the plaintiff was one, they were under a duty to him to exercise reasonable care in regard to it. *It seems to me that this is a much better way of putting the position than by regarding it as merely the case of an invitor and invitee* . . . the defendants were the main contractors, and they were fully aware of the purposes for which they erected the staging, and, in particular, that it was to be used by sub-contractor's workmen. Applying the words of Brett M.R. in *Heaven* v. *Pender* (11 Q.B.D. 503, 509), as explained and modified by himself in *Le Lievre* v. *Gould* ([1893] 1 Q.B. 491) and by Lord Atkin in *Donoghue* v. *Stevenson*, I consider that the defendants were under a duty towards the plaintiff to use ordinary skill and care in the erection of the staging, and that they failed in the performance of that duty." On appeal to the House of Lords the Scottish judges dealt with this second branch of argument by disregarding it, and Lords

Porter and Pickford favoured the narrower construction of Lord Atkin's judgment in *Donoghue*, considering that the duties thereby imposed on the manufacturers of products could not possibly apply to the facts before them. It was left to Lord MacDermott (now Chief Justice of Northern Ireland) to apply himself to the broader questions of principle raised in counsel's argument and Lord Justice Singleton's judgment: " In the Court of Appeal Singleton L.J. held for the respondent on two grounds. He first rejected the view of *Indermaur* v. *Dames* propounded by the appellants and found them in breach of the duty laid on invitors by that decision and, secondly, he was of opinion on the strength of the general principles enunciated by Sir William Brett M.R. in *Heaven* v. *Pender* and Lord Atkin in *Donoghue* v. *Stevenson* that the present appellants were under a duty to use ordinary skill and care in the provision of the staging. It is no doubt true that, on occasion, responsibility at law may be imposed concurrently by different rules, as, for example, where the claim sounds in both negligence and nuisance. *But I am not disposed to think that the liability in tort of an invitor to his invitee comes from more than one quarter.* I think that where there is such liability it must be found in the doctrine of *Indermaur* v. *Dames*: that, however, is not to say that the broad conception of neighbourly duty exemplified by *Heaven* v. *Pender* and *Donoghue* v. *Stevenson* is entirely irrelevant to the present investigation. *The question as I see it is whether Indermaur* v. *Dames also exemplifies that concept.*"

That statement appears to be in accordance with Scottish conceptions of liability founded on *culpa* and the classifications of Beven and Charlesworth; it also resists the establishment of negligence as a separate tort. It is interesting to note that shortly before this decision in the House of Lords a pursuer attempted to found a relevant case in the First Division against the occupiers of premises on which she had been injured, and invoked as the basis of her argument Lord Atkin's aforesaid dictum in *Donoghue*. (*M'Phail* v.

Lanarkshire County Council, 1951 S.C. 301; 1951 S.L.T. 167). In his judgment Lord Keith said:—

"In the circumstances averred, the pursuer alleges that the county council owed a duty to her to take reasonable care for her safety when visiting the school to record her vote, and in particular to provide a reasonably safe means of access for her across the slope in question, a duty which they failed to perform. As ultimately developed in argument by the pursuer's counsel, this duty was said to rest on the doctrine of neighbourhood or proximity in law, between the county council and the pursuer. Reliance was placed on the speech of Lord Atkin in *Donoghue* v. *Stevenson* and in particular on the following short passage in that speech (*ibid.* at p. 44) (his Lordship then quoted the passage in full). As applied to an occupier of heritable property that passage on one reading could be read as imposing a uniform duty on him in respect of all persons whom he should reasonably contemplate as likely to come on his land, and that could even include trespassers who strayed by accident or design thereon. But the ratio of *Donoghue's Case* has not yet been applied to dangers on land or dangerous structures. The decision is a leading decision in the realm of dangerous or defective goods or chattels. *In the matter of land the duties of an occupier in relation to various persons with whom he may come into legal proximity* qua *occupier have long since been defined and classified*, in relation at least to those persons who come on his land as invitees, licensees or trespassers respectively, to which categories may be added those who come by virtue of a contract specially entitling them to do so. The rigidity of the classification, which is not native to the law of Scotland, may be regretted, but seems now inescapable. Accordingly, even if the passage from Lord Atkin be read as referring to the source of duty rather than the extent of duty, as I think was perhaps intended, and be taken to apply to occupiers of land, *that leaves unanswered the question what is the extent of duty*

owed in the circumstances of a particular case to a person injured by a danger on the occupier's land."

These Scottish and English appeals clearly illustrate the practical significance of the classification of negligence in the laws of the two countries. In Scotland at any rate it seems clear that negligence is a new word for *culpa* and denotes that branch of law dealing with breaches of legal duty to take care. These duties spring from a general conception of moral wrongdoing that finds its expression in the standards of the reasonable man. Some of these duties appear somewhat categorical, such as the duties of manufacturers of products, of occupiers of premises, of masters towards servants in their employment, etc., but wherever the facts of a case do not coincide with these categories and where the extent of the duty has not already been defined, then one may still refer direct to the basic standards of the reasonable man for deciding the extent of the duty owed in the particular case.

Now it is this last aspect of the law of negligence, where the extent of the duty is still open, that now appears in England to have been reclassified into a separate and distinct tort. One can only say "appears" because it is so far only a textbook classification that was certainly rejected by Lord MacDermott in *Horton*, is not adopted by Beven or Charlesworth, nor does it appear to be the law of America (see *Restatement*, vol. II, Negligence). And even the authors of this classification may not really intend a separate tort of negligence to be invoked alongside other torts involving negligence; but rather to act as a kind of residuary tort only to be resorted to when these other torts do not apply. That would have the same effect as when in Scots law reference is still made to basic principles of liability. But if negligence is now regarded in England as co-partner with these other torts, concurrent liability appears to follow with all the complications raised by the second argument in *Horton*. In fact invocation of a separate tort of negligence concurrent with these other determined duties

would seem to have the effect of inviting the court to redefine the extent of these duties in every case where the new tort of negligence can be invoked. That may seem plausible enough where these determined duties are too stereotyped, such as those incumbent on the occupiers of premises. But what about the duties of manufacturers of products? Is it seriously to be contended that the court is now free again to circumvent the so-called " second rule in *Donoghue* v. *Stevenson* " and determine some new duty by reference to " the first rule?" Surely in this case English textbook writers cannot consider the " first rule " as defining a tort that is separate and distinct from " the second rule."

It may be that this article is sounding a false note of alarm. But with the ever increasing citation of English authorities, it is necessary to be on our guard against the confusion of our native principles. As Lord President Cooper recently observed in a Saltire publication entitled *The Scottish Legal Tradition*:—" The subject (*i.e.*, Reparation) is one on which in every country new problems are presenting themselves for solution every day. In the last resort it does not greatly matter what solutions are found, but it does greatly matter that in any given country the law should develop systematically and logically so that its future trend and application shall be capable of reasoned forecast. Either oil or water is preferable to the unsatisfactory emulsion which results from an attempt to mix the two."

W. A. Elliott.

SLAVE-CATCHING

(To Professor François Olivier-Martin
of the University of Paris.)

FROM early times,[1] a Roman whose slave escaped could secure the services of a professional *fugitivarius*. He might pay him for the work irrespective of results, or he might pay him only if he retrieved the slave ; in the one text where the mode of payment is mentioned, it is the latter arrangement which occurs.[2] At any rate it is clear that a slave-catcher, to be consistently successful, must cultivate the keepers of less reputable inns, skippers engaged in contraband traffic, slave-dealers, actors, panders, gladiators and suchlike people. This is not to deny that there may have been perfectly respectable members of the profession. Father Brown was friendly with Flambeau and Dr. Thorndyke with Polton. However, in the troubled times of the late Republic a racket sprang up which attracted so many that it became a serious menace. The ensuing tug-of-war between the legislator, who wanted to stamp it out, and the slave-catchers, who wanted to keep it going, reminds one of Chicago in the 1920's.

The racket worked in the following way : If your slave wished to get another master, or to be freed altogether, he would betake himself to a hiding-place from where he could contact a friendly slave-catcher. A few days later the slave-catcher—or an agent of his (it might be of advantage to employ a middleman, and there are indications in the sources that this industry was usually operated by companies) [3]—would call on you. He would tell you that he had seen your advertisement or otherwise heard of your

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[1] Varro, R.R. 3.14.1, employs *fugitivarius* in a metaphorical sense.
[2] D. 19.5.18.
[3] See Mommsen, *Roemisches Strafrecht*, 780 f.

misfortune, and was prepared to buy the runaway; of course, he added, it was a risky speculation since he might never find him, and, therefore, he could not give you more than a fraction of his value. For you, it was a question of either accepting the impudent offer or losing everything. Unless you were Cato, you would accept; that is to say, you would sell a slave worth 100 for 25, or, say, if he had taken with him a *peculium*, a fund which you had made him administer, you would sell the slave and his *peculium* worth 1,000 for 250. After a fortnight or so it would be quite safe for the slave-catcher to " discover " the runaway. He could then re-sell him openly to somebody else or give him his freedom. (To confer full citizenship, the slave-catcher had to be quiritary owner. He would hardly care to ask you to perform *mancipatio* of the recaptured slave: once you had an opportunity of questioning the latter, you might be able to prove collusion. But they need only wait for a year, when the slave-catcher would be quiritary owner by *usucapio*.) As you could not deny having sold the slave, the slave-catcher—provided he took reasonable precautions —would be fairly secure against charges of theft or abduction (*furtum*, *plagium*).

What, it might be asked, was the slave-catcher's profit if he freed the slave at once? (His profit if he re-sold him or freed him by will is obvious.) The rights of a patron were not so very valuable. Presumably a slave could expect to be freed at once only if he brought the slave-catcher a substantial *peculium*, or maybe some of your silver or your wife's jewelry. In such a case, enough would remain with the slave-catcher, even after freeing him, to make the transaction worth while. Occasionally, a beautiful slave woman might be freed for the purpose of marriage, but that would not be business. Again, what guarantee had the slave that the slave-catcher would carry out any agreements between them, for example, release him after two years or transfer him to a certain desirable master? Apart from such measures as physical assault or denunciation to the

authorities, his guarantee lay in the reputation of the firm. A slave-catcher who let down a runaway to whom he had given definite promises would lose his clientèle. Where legal sanction is lacking, as in the deals of the underworld or international relations, reliance must be placed on honour and good faith.

The Senate, at a date prior to Gaius's commentary on the provincial edict,[4] found it necessary to do something against this practice. A *lex Fabia* of the late Republic had imposed a fine of 50,000 sesterces on various types of *plagium*, among them the buying or selling, *dolo malo*, of another man's slave without that man's knowledge.[5] The Senate now extended the penalty to any buying or selling of a runaway slave not yet recaptured. That is to say, thereafter it made no difference whether or not the owner consented to the transaction; indeed, even if the owner himself sold the runaway, both he and the buyer were subject to the fine. The action was "popular," *i.e.* any citizen could institute proceedings. No doubt the sale was void. This is suggested by the language of the texts: "*nec emere nec vendere permissum est*," [6] "*venum dari aut comparari amplissimus ordo prohibuit*," [7] "*neque vendere . . . licet*." [8] We must also remember that in the original case of the *lex Fabia* the transaction cannot possibly have been valid; and, finally, there are parallels like the purchase of a *fundus litigiosus* from the non-possessor.[9] The senatusconsult was certainly hard on the owner whose slave was gone and who wanted to save at least something. But at the time the regulation seemed the only way of checking the racket described above. The slave-catchers must no longer be able to get their very victims, the owners of runaway slaves, to help them to cover up their criminal doings.

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[4] See D. 18.1.35.3, to be discussed presently.
[5] See Mommsen, *l.c.*
[6] P.S. 1.6a.2.
[7] Fr. de i.f. 9.
[8] C. 9.20.6.
[9] Fr. de i.f. 8.

A few details are worth noticing. One concerns a mere technicality of legislation, but it may be mentioned because the method in question seems to have been adopted quite frequently by Roman lawgivers. The senatusconsult forbade any buying or selling of a runaway. The point, we saw, was that, in addition to the buying or selling without the master's knowledge, which was already punishable under the *lex Fabia*, even sale by the master himself should be prohibited. But the point was not expressly stated in the main part of the senatusconsult. (Maybe a reference to it occurred in the preface.) Ulpian tells us that "this senatusconsult applies also to owners who have sold runaways;" [10] such an explanation—that it applies "also" to owners—can have been required only because the ban was couched in general terms. What we hear elsewhere about the tenor of the decree confirms this conclusion: "*fugitivum nec emere nec vendere permissum est*," [11] "*fugitivos venum dari aut comparari amplissimus ordo prohibuit*," [12] "*in fuga servum constitutum neque vendere . . . licet.*" [13] Nowhere do we find a special warning against sale by the owner. The last-mentioned text is particularly significant. It forms the beginning of a rescript addressed to a woman, Marciana, who had disposed of a slave while he was in flight. Perhaps she really did not know that, though still owning him, she must not do it. Anyhow the rescript says: "*In fuga servum constitutum neque vendere . . . licet; unde intellegis te in legem incidisse.*" From the general prohibition of selling such a slave, that is, she is supposed to realise that her transaction has been illegal. Surely, had the senatusconsult contained an express mention of sale by the owner, she would have been referred to it.

It follows that the senatusconsult partly re-affirmed a provision of the *lex Fabia*—namely, in so far as dealings without the master's knowledge were concerned—and only

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[10] D. 48.15.2.3.
[11] P.S. 1.6a.2.
[12] Fr. de i.f. 9.
[13] C. 9.20.6.

partly introduced new law—namely, as to dealings with his consent and, above all, sale of a runaway by the master himself. All these cases fell under the general prohibition of buying or selling a runaway, and all were now punishable. We have Ulpian's testimony [14] for the fact that other senatusconsults dealing with *plagium* in part at least restated established law : " *hoc senatusconsultum aditum dedit militi, cui rei etiam lex Fabia prospexerat et senatusconsultum Modesto consule factum.*" Another parallel is provided by the *lex Atinia*. The XII Tables had laid down that a thief cannot usucapt the stolen object. The *lex Atinia* extended the rule, laying down generally that a stolen object cannot be usucapted. The *lex Atinia* said nothing new in so far as it applied to the thief; its point—which was not, however, expressly stated—was the exclusion of usucapion even when the object had passed into the possession of an innocent party.[15]

On the other hand, the restriction of the ban to runaways not yet recaptured was expressly mentioned in the senatusconsult. Probably the term *absens* was used. We are told that " *absentes fugitivos venum dari aut comparari amplissimus ordo prohibuit.*" [16] We also learn that the senatusconsult is not directed against owners selling slaves who are merely absent but not runaways; not directed against owners " *qui cum absentes servos haberent eos vendiderunt, aliud est enim abesse aliud in fuga esse.*" [17] And in a decision which exonerates the parties concerned from infringement of the senatusconsult, emphasis is laid on the fact that the vendor " *praesentem vendit* " and the buyer " *praesentem emit.*" [18] The reason for this limitation of the decree is clear : once the owner has recovered the fugitive, the slave-catchers can no longer bring undue pressure to bear upon him and any sale will be voluntary.

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[14] D. 11.4.1.2.
[15] See the writer's article in *Cambridge Law Journal*, 1937, 231 ff.
[16] Fr. de i.f. 9.
[17] D. 48.15.2.pr.
[18] D. 18.1.35.3.

One case was privileged if not by the senatusconsult itself, then by some decree passed little later: if a slave jointly owned by coheirs or members of a partnership happened to be in flight at the time they wished to wind up their affairs by means of an action *familiae erciscundae* or *communi dividundo*, it was permissible for them to bid for the fugitive and the judge must award him to the highest bidder.[19] It was only fair to admit such an arrangement: this was not the kind of sale that the authorities were out to put a stop to; the rascally slave-catcher normally had no chance here. That the concession goes back to the original senatusconsult is probable from the wording of a rescript already mentioned: "*Unde intellegis te in legem incidisse quae super huiusmodi delictis certam poenam statuit, exceptis coheredibus et sociis quibus in divisione communium rerum licitationem de fugitivo servo invicem facere permissum est.*" Paul's account of the matter also sounds as if he had in mind a definite decree, whether the original senatusconsult or a subsequent one: "*Iudex de servo qui in fuga est iubere debet liceri eos inter quos iudex est et tunc eum adiudicare penes quem licitatio remansit.*" The term *debet* in "*iudex debet iubere*" seems to refer to some legislation.

It is interesting to observe the narrow scope of the exception. The bidding for the runaway must be among the co-owners, *invicem*. That is to say, each co-owner may make his offer to the other or others, but it would be illegal for the co-owners to accept an offer from an outsider. Furthermore, to go by the texts which have come down to us, even the bidding among the co-owners may take place only in the course of proceedings before a judge. If they divide their property without the help of the court, they do not enjoy the same privilege: in this case, should one of them buy the shares of the others in the runaway, they would be transgressing the senatusconsult. Apparently the Senate felt that only supervision by a judge would be

[19] D. 10.3.19.3, C. 9.20.6.

a sufficient safeguard against, say, collusion between one of the co-owners and the runaway.

Such, then, was the legislation by which it was hoped to end the dangerous racket. But the slave-catchers—and the unhappy owners of slaves who had absconded—were far from owning themselves beaten. One device they hit on was that the owner, instead of selling the runaway slave, which would have been contrary to the law, made the slave-catcher a present of him; presents the senatusconsult had not prohibited. No doubt the slave-catcher in turn made the owner a present of an appropriate sum of money. The use of this subterfuge may be inferred from the rescript to Marciana,[20] which begins: "*In fuga servum constitutum neque vendere neque donare licet.*" So at some time it became necessary to legislate against the dodge. Most likely it was suppressed before this rescript, since the law stated in the opening sentences seems to be taken for granted: the rescript continues "*unde intellegis te in legem incidisse.*" Of course, Marciana may have been unaware of it.

The rescript to Marciana dates from A.D. 287, and the evasion in question seems to have been declared illegal earlier than that. Yet it cannot be very old; in fact it could not have succeeded before the late classical or post-classical period. When the owner of a runaway slave, in consideration of some payment, made a slave-catcher "a present" of the slave, this certainly did not take the form of a promise by *stipulatio*. On the one hand, it would have been most unwise for the owner to promise delivery of a man whom he might never be able to lay hold of; and on the other, a *stipulatio* would not be good enough for the slave-catcher—he did not want to have to go to court, exposing himself to an *exceptio doli* and so on. Again, the "present" could not take the form of delivery by *traditio*, since it was impossible to perform *traditio* of an absent slave. There remains only *mancipatio*. But even here, in the

[20] C. 9.20.6.

time of Gaius, the slave to be transferred must still be present.[21] It was not until the late classical or post-classical period that a written *mancipatio* of an absent slave became fully valid. Accordingly, the device under discussion, the " gift " of the fugitive to the slave-catcher, cannot have been resorted to before the third century, and as it was rendered punishable before 287, the legislator in this case seems to have caught up quite soon with the circumventers of the law.

Throughout this argument, it has been assumed that the opening sentence of the rescript is genuine. If, as is possible though not probable, the reference to a gift is interpolated (" *neque donare* " might be put in the place of an original " *neque emere* "), then we cannot proceed from the year 287. The dodge in question may then have been proscribed at any date between the end of the third century and Justinian.

Another development began much earlier. Its starting-point was an absolutely honest arrangement between two friends, discussed in Gaius's commentary on the provincial edict.[22] Though Gaius gives it an impersonal colour—" if somebody does so and so " (*si quis*)—it is evident from the details mentioned that we have to do with a case that actually occurred. A slave escaped, and there was reason to suspect that he had gone abroad, let us say, to Antioch. A friend of the master's happened to plan a journey to Antioch, so the master asked him to look out for the fugitive and, if he found him, to sell him then and there—he did not want him back. The friend complied with this request. The question arose whether they—and the buyer at Antioch—had violated the law. Very possibly somebody threatened them with prosecution.

It would have been very wrong to inflict the heavy penalty on these people, and the jurists did clear them of any blame. Their argumentation was ingenious. The

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[21] G. 1.121.
[22] D. 18.1.35.3.

senatusconsult, they explained, forbade the selling and buying of a runaway not yet recaptured. In the case of the two friends, however, the owner of the slave did not fall under the senatusconsult because he had not sold him at all; he had merely asked his friend who was going to Antioch to sell him on his behalf—a different matter. Again, the friend did not fall under the senatusconsult because he sold the slave only after apprehending him. Finally, as for the buyer at Antioch, the same consideration applied to him: by the time he bought the slave he was no longer in flight. None of the three had sold or bought an absent fugitive.

This was an excellent decision. But before long it was turned into a general rule, when it certainly became capable of abuse. Ulpian writes [23] that no fine is forfeited by a master "who has given a mandate to catch and sell the runaway; for he has not sold a slave in flight." The mandate need not be given to a friend who happens to travel to some place abroad where the slave is thought to hide. It may, indeed, be given to a professional slave-catcher, and the slave need not be far at all. The subtle legal argumentation—"he has not sold a slave in flight"—which, in Gaius's case of the two friends, served to uphold a particular arrangement manifestly straightforward and reasonable, now forms the basis for the admission of a whole type of transaction such as must inevitably afford fresh openings to the unscrupulous. It would be interesting to know whether the general rule is of academic origin, or whether it was first formulated—be it by Ulpian himself or an earlier lawyer—as an opinion about actual disputes. The latter is perhaps the more probable. Slave-catchers and owners who came to terms with them doubtless had the means to employ able advocates in their defence.

To be sure, the transaction thus admitted, a mandate to catch and sell the man, might not leave the owner in quite so helpless a position as a direct sale of the absent

[23] D. 48.15.2.1.

fugitive. By a direct sale (before the senatusconsult intervened) he practically gave up all interest in the runaway. He received the agreed price—25 instead of 100—and that was the end of the matter. He had no redress if the slave-catcher a few weeks later re-sold the man at an enormous profit. As a rule, he would not even hear of what went on. By contrast, an owner who asked a slave-catcher to catch and sell the runaway could, if let down too badly, bring an *actio mandati*. He was entitled to know how the slave-catcher got on, he could demand an account, he still had some hold on things. Presumably this difference between the two cases was stressed by the lawyers responsible for the rule we find in Ulpian.

Nevertheless, a clever slave-catcher would have little difficulty in rendering the safeguard illusory. For example, there might be a clause in the mandate saying that if he could sell the slave—who was worth 100—for more than 25, he might keep the rest. The transaction would still be a mandate to catch and sell the fugitive. It would therefore still be legal. But the owner would not be much better off than on a direct sale for 25. In other words, a mandate could be used by slaves and slave-catchers for the same reprehensible purposes as a sale. Ulpian's rule does mean a real weakening of the efficacy of the senatusconsult.

There was, however, a more serious relaxation. Ulpian holds [24] that the senatusconsult does not apply where *A*, the owner of a runaway, gives *B* a mandate to catch him and at the same time sells him to *B* in the event of capture. You are not, that is, infringing the law by telling a slave-catcher: "Go after that fugitive, and if you can seize him keep him for 25." However logical the reasons for this view may have been, it is obvious that for practical purposes the arrangement closely approached that condemned by the senatusconsult: "I sell you that fugitive for 25."

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[24] D. 48.15.2.2.

The transaction is a mandate to catch the runaway, coupled with a conditional sale. More precisely, the sale is subject to the suspensive condition " if the slave is caught." It will not take full effect until capture. Therefore there is no transgression of the senatusconsult. At the moment of the agreement, when the slave is in flight, the sale is not yet fully effective; there is no selling and buying at all. By the time the sale becomes fully effective, on seizure of the slave, the slave is no longer in flight; there is no selling and buying of a fugitive not yet recaptured. Such appears to have been the justification of the arrangement in question.

As a legal argument, it was quite tenable. There were other instances where a conditional sale, so long as the condition was outstanding, did not count as a complete contract [25]; these would support the contention that the conditional sale of the absent slave was not a proper selling and buying falling under the senatusconsult. (No doubt the opposite view could have been defended: the attitude of Roman law to conditions is highly opportunistic.) Moreover, the jurists might invoke the analogy of an ordinary *res furtiva*, say, a ring stolen from *X* by *Y*. If *A* and *B* knew of the theft, an unconditional sale between them was void.[26] But there is little doubt that a sale conditional on the *furtum* being purged was in order. Sale of a free man " to take effect when he would be enslaved " was void only because to reckon on a free man's enslavement was irreligious.[27] This could not be said either of a condition that an ordinary *furtum* might be purged or of one that a fugitive might be caught. In any case, once the jurists had taken up a legalistic position with regard to a mandate to catch and sell the runaway, sanctioning it generally —*i.e.* not merely in very special circumstances—it was but a step to the admission of a conditional sale of the man.

The senatusconsult, however, was now virtually emptied

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[25] See Buckland, *Textbook of Roman Law*, 2nd ed., 423.
[26] D. 18.1.34.3.
[27] D. 18.1.34.2.

of all meaning. In fact, henceforth, it must have been almost more dangerous to innocent people than real offenders. It was where both the seller and buyer were decent and inexpert that they would fail to insert the requisite condition into their contract. Marciana, the rescript to whom we have repeatedly mentioned, may well have been a perfectly law-abiding woman.

True, one might think of an occasional practical difference between an unconditional and a conditional sale to a fraudulent slave-catcher. In the former case, the master would presumably never hear from him again; at least he would never be informed of the slave's "arrest." In the latter case—where you told the slave-catcher: "Find the man, and if you do keep him for 25"—the slave-catcher, to complete the transaction, must at some time give you news of the "arrest" and send you the price. He could not pay prior to the "arrest": that would make the affair look too much like an unconditional sale of a fugitive, which would be void and might lead to heavy fines. Once informed of the "arrest", you might try to go back on the agreement, alleging fraud on the slave-catcher's part. As on his own admission he was now in control of the slave, you had some chance of recovering the latter—a chance not likely to arise in unconditional sale, where the slave-catcher need not report success and might always deny knowledge of the slave's whereabouts. Still, the slave-catcher would see to it that proof of fraud was not easy. Or he might take the precaution to tell you that he had captured the slave—so the sale was now complete—but that the slave had escaped once more. The fact remains that it proved impossible to enforce the senatusconsult against the joint resistance of slave-catchers and the owners of slaves whom they exploited. Many legislators have found an alliance between gangsters and their victims difficult to beat.

The question arises whether this last relaxation was really approved by Ulpian—as we have assumed so far—or

whether there is interpolation. That recognition of a conditional sale came after that of a mandate to catch and sell is clear not only from general considerations but also from the text itself: we are first told about the mandate to catch and sell, and then follows the conditional sale, introduced by "*amplius dicendum est.*" As we have seen, even the indiscriminate admission of the mandate is later than Gaius, who still has the special arrangement between two friends. It might perhaps be argued that the conditional sale can hardly have been allowed by the time of Ulpian. In view of the careful and subtle presentation of the case, however, the probability is that it was.

Whether classical or not, the relaxation cannot be explained as a freak, unrepresentative of the general trend of the law. For it recurs in the rescript to Marciana and in Paul's *Sententiae*.[28] In the rescript, indeed, the admission of a conditional sale at first sight strikes one as a later addition.[29] The rescript opens with the principle that a runaway may be neither sold nor given away as a present. It goes on to inform Marciana that, in consequence, she is liable to the penalty imposed on any delicts of this kind with the exception of certain transactions between coheirs or partners. Then, in a fresh sentence, it is stated that no objection exists to a sale conditional on the buyer catching the fugitive. From this Marciana can have derived no comfort: it is clear that she had either sold the man unconditionally or made a present of him. However, for one thing, even if the last sentence were spurious, it would not follow that the law given in it must be post-classical. For another, it appears that rescripts often contained a little more than the rule applicable to the particular problem, especially if, as in this case, the addressee might be given guidance for the future. On this basis the last sentence is not out of place at all. That it comes rather abruptly after what precedes may be accounted for by the history

[28] 1.6a.1.

[29] *Cf.* Levy, *Pauli Sententiae*, 111.

of the law on the matter : it was only natural for the author in the first instance to quote the original exception—the auction among coheirs or partners—and to introduce the far later concession respecting a conditional sale as an afterthought.

Paul's *Sententiae* speak of a fugitive bought by a slave-catcher, and the description of the seller as his " former master " shows that the transaction is regarded as valid. Presumably the parties are thought of as having adopted the correct procedure, *i.e.*, the slave was sold conditionally on the slave-catcher's finding him.[30] This is not expressly mentioned. But in the next paragraph the *Sententiae* declare that sale of a slave in flight is forbidden and punishable. Unless this is an utterly pointless, mechanical recording of out-of-date law, it must mean that an unconditional sale would still be illegal. As remarked above, even so the ban was hardly worth retaining : slave-catchers could easily operate their racket by means of the conditional sale.

Nevertheless, from Paul's *Sententiae* we may gather that in this long drawn out battle of wits the underworld had not the last word. A slave bought by a slave-catcher, we learn, may not be freed during the next ten years without his former owner's consent. This provision—unless it antedates the senatusconsult prohibiting sale of a runaway, which is extremely improbable—can have been laid down only after a certain class of sale at least had acquired recognition. Till then, the slave-catcher could never free the man because the senatusconsult barred him from becoming owner ; ownership remained with the seller. Actually, we may see in this provision a direct consequence of the admission of sale of a fugitive. The legislation outlawing such a sale had broken down ; it had proved impossible to prevent owners from coming to terms with rascally slave-catchers. But the authorities did not leave it at that. They now tackled the problem in an entirely different way,

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30 Levy, *l.c.*, takes it for granted that the reference is to a conditional sale.

making manumission of the fugitive bought to depend on his former master's consent. The effect must have been to render escapes to a slave-catcher considerably less frequent. The senatusconsult had attempted to stamp out the racket by measures directed against the owner of the runaway and the slave-catcher. That had not been successful. The new measure under notice was directed against the slave.

It should be noted that when a slave-catcher asked the former master for his consent to manumission, he was thereby admitting that the slave was now caught and in his possession. The former owner might seize this opportunity for maintaining that he had been cheated and reclaiming the man. In any case, he could lose nothing by a refusal to authorise the release. If he felt in the least dissatisfied, he would refuse. A further point of some relevance is that the provision says, not that the slave-catcher may not release the man without his former master's approval, but that the man may not be released without it. The disability sticks to the slave, the provision applies even when he has changed hands. In other words, the law cannot be circumvented by the slave-catcher's selling him to a third party—even a third party needs the original master's sanction for manumission.

On the other hand, it seems that the restriction is intended to operate only if the runaway was purchased from his owner by a professional slave-catcher, a *fugitivarius*; but that if one not belonging to that trade purchased him, he may free him in the ordinary way. The original senatusconsult had made no such distinction (except for the admission of certain arrangements in the course of a divisory action). The provision here discussed is confined to sales plainly suspect and carefully refrains from interfering with any others.

There is no reason to doubt that it had the desired effect. Certainly, it would make no difference to a slave who escaped simply in order to change his master, with no

pretensions to freedom. But it would deter one whose object was manumission. He knew that he would have to wait for ten years; and he would think twice before giving such long credit even to the best known company of slave-catchers.

In conclusion, a few words may be said about the text of D. 48.15.2pr.: "*Sciendum est legem Fabiam ad eos non pertinere qui, cum absentes servos haberent, eos vendiderunt.*" What Ulpian means is that a person selling a slave of his who is merely absent but not in flight need not fear the senatusconsult. Why, then, does he say that he need not fear the *lex Fabia*? The *lex Fabia* had not yet disapproved of a sale by the owner at all.

Lenel's answer is that the words "*Sciendum est legem Fabiam*" are due to Justinian.[31] This is widely accepted.[32] It is difficult to see, however, why Justinian should have altered the correct reference; of course he may have been careless, say, when shortening Ulpian's discussion. But quite apart from this, the reference to the *lex Fabia* is perfectly intelligible. As pointed out at the beginning of this article, the senatusconsult with which Ulpian is here dealing had extended the penalty of the *lex Fabia*—a fine of 50,000 sesterces—to the sale of a runaway slave by the owner. It had undoubtedly made mention of the *lex Fabia*. Indeed it may have spoken, not of 50,000 sesterces at all, but simply of "the penalty of the *lex Fabia*." At any rate, the connection with the *lex Fabia* was sufficiently close for Paul to remark[33] that if joint owners of a fugitive wind up their affairs and bid for him before the judge, there is no risk "that the penalty of the *lex Fabia* will be incurred on the ground of the senatusconsult" ("*ne ex senatusconsulto poena legis Fabiae committatur*"). This is a very exact formulation. But surely, in an appropriate context, a writer might express it more

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31 *Palingenesia Iuris Civilis*, Vol. 2, 985, n. 7.

32 See, *e.g.*, the 15th ster. ed. of *Corpus Iuris Civilis* by Mommsen and Krueger, Vol. 1, 859, n. 12.

33 D. 10.3.19.3.

briefly : "*ne poena legis Fabiae committatur.*" There is no reason why Ulpian, of a transaction not punishable under the senatusconsult, should not have said that "the *lex Fabia* does not here apply," meaning "the penalty of the *lex Fabia* on the ground of the senatusconsult is not here incurred." The rescript to Marciana tells her that "you are falling under the *lex* which has imposed a penalty on such delicts." It is quite conceivable that the author chose the term *lex* because he had in mind not only the senatusconsult (though, admittedly, by the second half of the third century the description of a senatusconsult as *lex* must have been common) but also the *lex Fabia*. The upshot seems to be that D. 48.15.2pr. requires no emendation.

DAVID DAUBE

THE LIEUTENANCY AND MILITIA LAWS IN 1745

HENRY FIELDING, in one of his characteristic asides, carefully distinguished between those historical writers who "draw their materials from records," and those who do not; a distinction which made him "so cautiously avoid the term romance."[1] One would expect, however, that the terms history and romance might come together at least in the story of the Jacobite risings. But nothing of the sort. It has been said that many a sober devotee of history has approached this particular field with an honest intention to truthful inquiry and impartial investigation, but has been lured away to fall a victim to the well-known magic spell.[2] He has been seduced from history by romance; he has, perhaps all unwillingly, or possibly quite unwittingly, been converted—corrupted—from historian to romancer.

Whilst Alderman History—to borrow another reference from Fielding—has been telling his tedious tale, Monsieur Romance has been up to his tricks.[3] Indeed the gay Monsieur has so completely taken possession of Jacobitism as a subject all his own, and has so fiercely resented any encroachment upon it, that the poor stolid Alderman has felt constrained to abandon it altogether in despair. The domain then is Calliope's, not Clio's.

And so it was that while the romancers—with all their tales and ballads—ignored the particular problems presented by the militia in 1715 and again in 1745, or dismissed them off-handedly with a snub and a sneer, the historians—with all their records—have never, apparently, felt confident enough to take a closer look. Nor did the lawyers, and it

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[1] *Tom Jones*, XI, i.
[2] *cf.* Willmott Dixon, *The Jacobite Episode* (N.D.), 1.
[3] *Tom Jones*, XIII, i.

is perhaps as much their field as the historians'. Even when *The Juridical Review* published before the war an interesting but brief paper by W. L. Burn on the militia in Scotland in 1715[4] (based almost exclusively upon the Loudoun Papers in the Huntingdon Library), the article seems to have provoked neither lawyers nor historians to make a more detailed review of the legal and historical facts and problems of the case.

The problems are briefly these: (1) How came it that certain of the counties, particularly in Scotland, were left at the outbreak of the 'Forty-five with no Lord Lieutenant in office in whom alone (under the King) legal command of the militia was vested? (2) On what grounds was it doubted, even in those counties which had a Lord Lieutenant in office, that the militia could in the then state of law be mustered and subsisted without some further specific statutory warrant? (3) Why was it that the Ministry later turned so deliberately away from the ready-made and familiar machinery of the Lieutenancies and the county militia, to have recourse to other untried and unfamiliar methods of raising local levies? And (4) why in those rare instances where units of the county militia were in fact embodied, as for example in Cumberland, Westmorland and Lancashire, were they stood down again without being brought to any effective action? These questions have never been properly answered.

The records principally relied upon here will be the State Papers, Domestic, George II,[5] the State Papers, Scotland, ii Series,[6] the correspondence of the Secretary of State for Scotland,[7] and various other official papers, all at the Public Record Office; the Duke of Newcastle's Papers in the British Museum[8]; the Lord Advocate's Papers in the

[4] XLVII (1936), No. 1, pp. 45–47.
[5] Cited below as "SPD, [bundle]/[number]."
[6] Cited below as "SPS, [bundle]/[number]."
[7] State Papers: Scotland: Letter Books: 13 (1742–46), cited below as "Tweeddale LB."
[8] Addl. MSS. 32705, cited below as "Newcastle pp."

National Library of Scotland [9]; and the Lieutenancy Papers and Quarter Sessions Rolls and other records in respect of the various counties preserved in the local record offices, particularly those at the Courts, Carlisle,[10] and at the Lancashire County Record Office at Preston.[11]

To understand the constitutional basis of the militia at the time of the Jacobite risings, it is necessary to go back to 1642, to the breach between Charles I and Parliament, and to 1660–62, to the Restoration Settlement. The Long Parliament by its own ordinances,[12] had purported to limit the Royal Prerogative in regard to the militia. The King, however, promptly repudiated the limitation, and reasserted his sovereign rights.[13] It therefore became a question how far authority over the militia resided inherently in the Crown, being now founded only upon usage, and being not only unsupported by statute, but positively repudiated by the legislature.[14] At the Restoration, the Cavalier Parliament in its militia settlement acknowledged the Crown's prerogative rights, and enacted that the supreme and sole command was, and "*ever was*, the undoubted right of His Majesty," and that Parliament "cannot, nor ought not, to pretend to the same." [15] Parliament thus acknowledged itself to have no power to initiate the levy of the militia and thus seems to have abandoned quite definitely one of the main principles for which Parliament fought the King. The settlement of the militia in these

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[9] Robert Craigie of Glendoick. MS. 3030 and 3036, cited below as "Glendoick pp." (The Glendoick papers have been partly printed by Jesse—*Memoirs of the Pretenders*—but the passages here cited have mostly been omitted by Jesse.)

[10] All the documents among the Lieutenancy papers and the Quarter Sessions records of the county of Cumberland bearing upon the Jacobite risings are about to be published in the county's Record Series, Vol. I, *The Jacobite Risings of* 1715 *and* 1745, edited, with historical introduction, by the present contributor.

[11] The family papers of the Earls of Derby have with commendable public spirit been deposited in the County Record Office. Those principally relied upon here are DDK, 1741.

[12] Acts and Ordinances, March 3 and 29, 1642 (*Acts and Ordinances of the Interregnum*, ed. C. H. Firth and R. S. Rait, i, 1–6).

[13] Proclamations, May 27, 1642 (S. R. Gardiner, *Constitutional Documents of the Puritan Revolution*, 3rd ed., 248).

[14] *cf.* Blackstone, *Commentaries*, Bk. I, c. 13.

[15] First Militia Act, 13 Car. 2, stat. 1 (1661), c. 6.

terms, so it has been said, is one of the conspicuous features of the Restoration Settlement.[16]

There was, however, in the Second Militia Act a rather unobtrusive clause relating to pay—important at least in its results—which seems not to have attracted the attention which, by its repercussions, it warranted. Sir William Holdsworth in his *History of English Law*,[17] and Sir Charles Grant Robertson in his *Select Statutes, Cases and Documents*,[18] for example, passed it without notice.[19]

The First Militia Act was of course no more than an interim measure; the draft of a further Bill in altogether more detailed terms was then under consideration, "which Act cannot as yet be perfected."[20] The latter Act, the so-called Second Militia Act,[21] when it was "perfected" provided in detail, among other things, for the militia's pay. When the militia was called together for its fortnight's annual muster the militiaman's pay was to be borne by his master (or the person who "provided" him); but whenever the militia was called into active service one month's pay, on the scale laid down by statute, was to be provided "in hand" to the militiaman by his "provider," to be refunded from the public revenue. The critical clause went on to provide that until so refunded no further charge could legally be made by the Crown for this militia service.[22]

Thus, apart from an annual exercise and training muster, the Crown could call out the force for actual service for only one month in the first instance; but before it could muster the force again, or hold it mustered beyond this initial period, the Crown must refund the one month's pay formerly advanced. Thus if Parliament could contrive to leave the counties with a month's pay unrefunded, it might

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16 Sir C. G. Robertson, *Select Statutes, Cases and Documents to Illustrate English Constitutional History*, 28.

17 Vol. VI.

18 pp. 28–30.

19 Clode, however, commented on the clause (*Military Forces of the Crown*, I, 34–35).

20 13 Car. 2, stat. 1 (1661), c. 6.

21 14 Car. 2 (1662), (13 & 14 Car. 2, in Ruffhead), c. 3.

22 *ibid.*, s. 6.

very well without any derogation of the Royal Prerogative of command, assume a control over the levy of the militia; at least, the Crown might find itself in the position of having to invoke the assistance of Parliament to raise the one month's pay, or to have recourse to parliamentary action to set the restraining provision aside.[23] This was what in fact came about, and the facts as they worked themselves out in the crisis seem to warrant a closer attention than they have hitherto received.

After the Revolutionary settlement of 1688 some body of opinion was in favour of reorganising the militia as an alternative to a standing army, but no action was in fact taken. An Act was passed however which by its terms enabled the Crown to raise the militia "for one year though the pay formerly advanced be not repaid,"[24] and this Act seemed in the reigns of William and of Anne likely to take on the annual character of the Mutiny Acts. At the accession of George I the new Militia Act[25] had a currency of five years, but at the expiry of that period, although the annual Mutiny Acts continued to be passed to provide for the discipline of the army, the Militia Acts were not passed annually to provide for the militia's pay. The subject came up again in 1734 as we shall see below, and then not again before the actual outbreak of the 'Forty-five.[26] "Sole and supreme command" then by the King; effective control by Parliament: that was in effect the formula. It will be found however that it was this curb placed by the Cavaliers upon the Stuarts in 1661–62 which severely handicapped the Whigs in their suppression of the Stuart risings in 1715 and 1745—a curb by that time already half-forgotten, and almost completely overlooked ever since.

With regard to the first limb of our problem, the vacancies in the Lieutenancies at the time of the outbreak of the 'Forty-five, it should be clearly understood that the

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[23] As it was in fact set aside (7 Geo. 2 (1734), c. 23).
[24] 2 W. & M., stat. 2 (1690), c. 12.
[25] 1 Geo. 1, stat. 1 (1714), c. 14, s. 10.
[26] 7 Geo. 2 (1734), c. 23.

Lord Lieutenant was the principal military officer of a county. At the Restoration the ancient office had been recognised and made permanent. "Full power and authority" over the county militia, "to arm and array," "lead, conduct and employ it," was, under the Crown, vested solely in the Lords Lieutenants. Although their authority derived direct from the Crown, "His Majesty's Lieutenants of and in the Counties" had been careful to seek, and indeed to obtain, from Parliament, statutory indemnity —however convincingly it may be argued that such indemnity was redundant—for any action taken or to be taken in furtherance of Royal command.[27] Yet if at any particular time there occurred any hiatus in the Lieutenancy there was represented to the King the "ill condition of the countrie to oppose anie invasion by reason of the want of Lieutenants," under whom commissions could legally be taken.[28] This precisely was the position in certain of the counties in Scotland in 1745. The situation was quickly realised by the northern Whigs, for the Earl of Sutherland, writing to the Lord Advocate already on August 11—the news of Charles Edward's landing did not arrive in Edinburgh until the 8th—said, "it will be further necessary, my Lord, that a proper person have a Commission directly sent him to act as Lord Lieutenant of the Northern Shires."[29] That the plea of lack of authority was not always merely an excuse for lack of activity in the counties is shown by the fact that the same point was advanced also by the "King's servants in Edinburgh," the principal Law Officers in Scotland. Andrew Fletcher of Milton, the Lord Justice-Clerk, expressed his concern to the Ministry in London that in the absence of any Lord Lieutenant the Government supporters in certain of the counties in Scotland would lack authority to "appear in a legal way for the

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[27] 13 Car. 2 (1661), stat. 2, c. 6, s. 2.

[28] Lord Lonsdale, *Memoirs* (1808), 49; and Rydal MSS. (Hist. MSS. Com. 12, R. VII), 215.

[29] Glendoick pp., 3030/250–1 and 3036/97 (in fact the letter is not signed. Not published by Jesse).

defence of His Majesty's person and support of the Government, and the preservation of our religion, liberty, and property." He must now, therefore, " deliberate about means to raise some men by [some other] authority from the Crown." [30]

The Lord President also, Duncan Forbes of Culloden, advised the Secretary of State in London with regard to raising the men of the counties in the absence of the proper appointment of Lords Lieutenants, that he did " not know that there is at present any lawful authority that can call them forth to Action." [31] The Secretary of State replied that the Ministry in London " took note of the want of Lords Lieutenants in the several Counties," and would have been glad if the Lord President could have suggested any way by which the want could now be supplied.[32] The Lord President was not to be drawn: " In 1715 Lieutenants were established in all the Counties. If any such thing now subsists, it is more than I know." [33]

According to John Clerk of Penicuick, one of the Barons of the Exchequer, it was no mere mischance that these Lords Lieutenants had gone unappointed. It was a matter of mere manoeuvring by the contending political factions in Scotland, and even within the Ministry in England. The factional differences in London between Tweeddale, the Secretary of State for Scotland, and the Pelhams, his seniors in the Ministry, were reflected in Edinburgh by the factional differences between their respective clients, Robert Craigie of Glendoick, the Lord Advocate, and Andrew Fletcher of Milton, the Lord Justice-Clerk. Clerk of Penicuick went on to say that in the face of these differences " it could not be agreed who should be intrusted with Lieutenancies, and therefore nobody was named." [34] Tweeddale's faction, it seemed,

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[30] SPS, 25/102 and 26/7 & 12; or Milton Papers (*cf.* Home, *History*, Appendix), Nos. 13, 16 and 17.

[31] SPS, 25/51; or *Culloden Papers*, No. 247.

[32] Tweeddale LB., f. 272.

[33] SPS, 25/51; or *Culloden Papers*, No. 247.

[34] *Memoirs* (Scottish History Society, XIII, 1892), 81.

had professed to discount the seriousness of the rising; "they could easily put a stop to it, and make some great merit of doing it themselves." They would therefore consult none but their own people, said an ardent Whig in the North of England, Chancellor Waugh of Carlisle, on the basis of information from the South of Scotland. They "did not care Lieutenants should be appointed for fear not of their own party." [35] When on September 7 the Lord Justice-Clerk wrote about the hiatus in the Lieutenancies to the Secretary of State—they were both Whigs, but in opposing camps—he said, "although I have written often on this subject I am sorry I have not been empowered to say anything satisfactory to so faithful subjects." [36] Tweeddale replied tartly on the 12th, "allow me to say, it is not sufficient to mention defects if it be not at the same time suggested how these defects can be supplied." [37] His under-Secretary in London, Sir Andrew Mitchell, wrote by the same post, somewhat facetiously to his opposite number, My Lord's client in Edinburgh, Robert Craigie of Glendoick: "My Lord has wrote to the Justice-Clerk in answer to a most pathetic letter of his setting forth the agonies His Majesty's subjects are in for want of a legal authority . . . My Lord has very explicitly desired him to give his opinion plainly." [38]

Even in a county which had a Lord Lieutenant duly appointed—and he a staunch Whig who had moreover given some thought to the Lieutenancy system and law—Argyll had been left without the complement of Deputy Lieutenants necessary to raise the militia of the county, so that as late as the middle of August the sheriff-depute of Argyll was urged to make out a list of *possible* deputies together with blank commissions for the Duke's signature, *if the militia should be called out.*[39] Although Tweeddale

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[35] G. G. Mounsey, *Carlisle in 1745* (1845), 25.
[36] SPS, 26/12; or Milton Papers, No. 17.
[37] Tweeddale LB, ff. 276–9.
[38] Glendoick pp., 3030, f. 142 (not in Jesse).
[39] Campbell of Stonefield MSS., quoted by Sir James Fergusson, in *Argyll in the Forty-Five*, pp. 22, 27 and 37.

repeatedly said to the Lord Advocate, his henchman in Edinburgh, that he could not imagine what further warrant could be necessary during an actual rebellion to empower people to arm in their own defence and that of their Government, yet his faction had to admit that there must be some sort of difficulty there.

In the same post as Tweeddale's letter to the Lord Justice-Clerk, his under-Secretary said to the Lord Advocate—a second string to a second string, but they were in the same team—" I mentioned to you formerly, what I heard as your opinion . . . *viz.*, that it was not lawful to arm the militia . . . I do not see what other opinion could be given, as there are no Lord Lieutenants to call forth the Militia "; but, they argued, they could not see how " that opinion can ever be strained to imply that in actual Rebellion the raising Men, and joining the King's Troops, and receiving arms from his General to be made use of in defence of the established Government can be High Treason notwithstanding c. 5,[40] Parl. 1st Charles II." [41] But events moved quickly and soon made plain to first strings and second strings whose team was losing the match.

In the Highlands the situation was further complicated by the Disarming Acts.[42] Was it in fact an offence to bear arms even in defence of one's own home? The Whig Duke of Argyll at least—a Highland magnate who could, as it was said, if he really wanted put more men into the field than all the Government forces in Scotland put together—made no secret of his opinion. He refused the Government's proffered arms. He could not, he protested, legally accept them; in the present state of the law " it is not lawful for any person in the Highlands to defend the Government, or his own Home, family or goods, though attacked by Robbers or Rebels. In these circumstances I can do nothing but wish well to the Government." [43] It

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[40] *sic.*, presumably the First Militia Act (13 Car. 2 (1661), c. 6).
[41] Glendoick pp. 3036, f. 95.
[42] 1 Geo. 1, stat. 2 (1715), c. 54, s. 1; and 11 Geo. 1 (1724), c. 26.
[43] SPS, 25/61 and 62.

may very well be that his arguments were specious, but at least they were widely held, even indeed, by members of the Ministry and the Law Officers of the Crown. Argyll was the pillar of the Whig cause in Scotland, but when the Whigs—of the wrong faction—begged his "assistance advice and countenance" Argyll could only reply "assistance advice and countenance! Magna sonantia Verba!"[44] and went off to leave Scotland to her fate. "A certain great man," said Tweeddale of the other faction disdainfully, "has lately made a long and safe retreat."[45] But Argyll maintained his attitude throughout. There was a deficiency, or at least an uncertainty, in the law. He was "very sensible of the inconveniences arising to the Government and to the country"; but for his part he was "unwilling to subject himself to penaltys and trust to pardon." The law might be pretty poor, but he would keep on the right side of it.[46]

We pass on then to the second limb of the problem, namely, the grounds upon which it was doubted, even in those counties where a Lord Lieutenant was in office, whether the militia could in the current state of the law be legally mustered and subsisted without some further specific statutory warrant. The law about the power to hold the militia embodied, and to raise its pay and subsistence after the expiry of the initial month, has already been touched upon. The exact terms were by no means clear. Charles II's Second Militia Act[47] had to be clarified in this regard upon the accession of Anne,[48] but already in the very next session this clarification itself required to be further clarified.[49] More recently an Act of 1734[50] removed the legal stop and empowered the King to draw the militia into actual service, notwithstanding that the month's pay

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44 SPS, 25/64.
45 Tweeddale LB, ff. 250–1.
46 Campbell of Stonefield MSS. (Register House, Edinburgh—August 15, 1745), quoted by Sir James Fergusson, *Argyll in the Forty-Five*, 22.
47 14 Car. 2 (1662), c. 3, as modified by 2 Will. 3 (1699), c. 14.
48 1 Anne (1702), c. 17.
49 1 Anne, stat. 2 (1702), c. 15.
50 7 Geo. 2 (1734), c. 23.

formerly advanced had not been repaid. But this latter Act expired in its terms at Midsummer, 1735, and hence the militia could not again be mustered until the pay advanced by the counties in the past had been repaid by the Crown, or alternatively until a further Act had been secured to set the provision legally aside once more. And there was the rub, for at the outbreak of the 'Forty-five Parliament was not in session, and furthermore could not for the present be called into session: Parliament stood prorogued until August 22. It was then further prorogued until September 19 [51] and again until October 17.[52] The trouble was that the King had consistently refused to delegate to the Council of Regency the power to summon Parliament in his own absence, and he himself was now in his beloved Hanover. Thus, if there were a defect in the law Parliament could not for the present be summoned to remedy it. Any projected measure must necessarily await the King's return and his own recall of Parliament.

In the meantime, the Lords Lieutenants in the counties and their Deputy Lieutenants were clearly in a dilemma, especially in the north where the militia had been ordered by the Council to be put in readiness for immediate service. The Deputy Lieutenants of Northumberland, for example, addressed themselves in the middle of September to Lord Tankerville, their Lord Lieutenant:

> We shall not be able to raise subsistence money to pay the Militia. The Act of Parliament of the Seventh of his present Majesty, Chapter 23 having expired at Midsummer 1735. We therefore beg your Lordship would favour us with your advice and directions in these particulars.[53]

The same doubts were entertained in Durham and here the Lord Lieutenant pressed the Secretary of State to request the Attorney-General "to give his opinion concerning the lawfulness of ye Deputy Lieutenants, acting in

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51 *London Gazette*, August 13–17, 1745.
52 *ibid.*, September 17–21, *Commons Journal*, XXV, 3.
53 SPD, 68/28.

ye present crisis." [54] Within a week Durham reported that a summons for a general meeting had gone through the county,

> but Still ye Objection I mentioned in my last to yr Lordship sticks with them, yt they were not legally empowered as the law stood to draw them out, and press me for a Resolution of that point by Ld. Chancellor or Attorney General, who I beg yr Lordship will consult.[55]

Lord Derby too, for Lancashire, spoke in September of "the Difficulties that there are in calling out the Militia" [56]; and when in the emergency of November he did in fact muster them, he reported to the Secretary of State, "I am sensible We have done that in strictness of Law we cannot justify." [57] The situation was of course to be most acute in the North-West.

The Duke of Newcastle, the Secretary of State, wrote to Lord Lonsdale, the Lord Lieutenant of Cumberland and Westmorland, referring to the representations which had been made by the Lieutenancy of Northumberland regarding what they felt to be the legal bar to mustering and subsisting the militia. The Ministry recognised that it was "probable that the same difficulties may arise in the other Northern Counties where the Militia had been in like Manner ordered to be put in Readiness for immediate Service." [58]

Lord Lonsdale informed the Secretary of State in the middle of September that he had as yet "received no Representations or Objections of any kind from the Deputy Lieutenants of either County" against raising the Militia [59]; but Lord Lonsdale was writing from his seat in Yorkshire and had not in point of fact been within the confines of either of his counties during any time in the

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[54] *ibid.*, 68/15.
[55] *ibid.*, 68/80.
[56] *ibid.*, 68/27.
[57] Newcastle pp., f. 314.
[58] SPD, 68/94.
[59] SPD, 68/28.

crisis,[60] nor had he consulted his Deputy Lieutenants in that regard.[61]

In any case, the Ministry decided to introduce a short Bill to remove the legal difficulty. The King landed at last from Hanover on August 31. Parliament could not meet until October 17. A new Militia Bill, providing that it should be legal to hold mustered and subsist the militia for a further month notwithstanding any existing provision to the contrary, was prompt in passing all its stages in the Commons. The Lords agreed, and it received the Royal Assent the same day, November 2.[62]

There was, however, some faulty drafting somewhere, for even before the Bill had passed it could be pointed out that the " further month " which the new Act authorised had by now already expired. The only practical effect therefore of the new Act would be to indemnify those concerned in the " further " month, that is the month since expired: the current month, that is a yet further month, remained still without any legal warrant. To realise fully the complications all this doubt and confusion brought into the local administration of the militia, and particularly its pay, one would have to study in detail the Lieutenancy minute books and papers, the Quarter Sessions minute books and the Rolls (particularly the Petition Rolls), in some of the critical counties.[63]

In Cumberland and Westmorland, for example, representations were made over fully representative signatures (from each county, the horse and foot, and the civil arm) to the effect that the militia was fully mustered and posted to stations; the further month, legal or illegal, would expire in seven days; specific " Advice and Directions " were now sought, as to " how in this critical juncture, we

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60 SPD, 73/68.

61 This is clear from the Cumberland Lieutenancy minute books.

62 *Commons Journal*, XXV, pp. 12–19.

63 See, for example, the Cumberland Quarter Sessions minute books, and the Petition Rolls, Easter, Midsummer and Michaelmas Sessions, 1746. How this apparently purely Lieutenancy business normally finds itself recorded in the Quarter Sessions proceedings cannot, for lack of space, be explained in detail here.

[the Deputy Lieutenants and Commanders of Companies] ought to proceed."[64] The Lord Lieutenant told them that he for his part "would advise them to nothing which was contrary to law." He passed the question therefore along to the Secretary of State. The Duke of Newcastle consulted the Lord Chancellor, who admitted "it is true that the Lord Lieutenant and his Deputies can't tax the country for another month's pay, and indeed in those counties I don't understand how, as the law now stands, they could do it for one." If the new Bill before Parliament will not in fact empower them to do it, "the Government had better take upon themselves the second Month's pay in the first instance." [65]

The Duke of Newcastle did not however reply to the Lord Lieutenant in quite those terms. Instead he begged him to keep the militia mustered in so critical a county, mentioning the new Bill which should have the effect (he said hopefully) of removing the legal bar. But Lord Lonsdale replied promptly to the Secretary of State that although he had requested the deputies to keep the militia subsisting, the new Bill His Grace referred to would not in fact remove the difficulties, "as the Month's Pay that it seems to refer to is not the Month that makes the present Difficulty . . . Your Grace will be pleased to observe that till the last Month's Pay is actually Repayed the same Difficulty still remains." [66]

"The same difficulty still remains." The phrase should ease us along very conveniently to the third limb of our problem, namely, why it was that the Ministry turned so confusedly away from the familiar and constitutional procedure of the militia and the Lieutenancy, to have recourse to other methods and forms of supplementing the regular forces. These "irregular" methods have six main forms: (a) companies and troops formed by the Lieutenancy, other than companies of the county militia and troops of the

[64] SPD, 72/34 enc.; and Cumberland Lieutenancy minute book, f. 20–23.
[65] Newcastle pp., f. 290.
[66] SPD, 72/121.

county light horse; (b) similar companies and troops formed in the counties by lords other than the Lords Lieutenants; (c) companies formed in the cities and boroughs by mayors and corporations under the direct authority of Royal warrant; (d) the so-called "subscription soldiers" raised by the "associations"; (e) the 13 additional regiments raised by noblemen and disbanded after the emergency; and (f) the men raised in the companies formed under the "blank commissions," the best-known of which were those issued to the Lord President, Duncan Forbes of Culloden. The first four of these classes are sometimes difficult to distinguish from one another, and indeed they need not be distinguished at all, perhaps, except from the point of view of their legal and constitutional authority.

Apart altogether from the legal difficulties, those who were most closely concerned with the Lieutenancy, and most likely to understand the militia and be familiar with its potentialities, could see other and more practical difficulties. The militia had remained the popular constitutional arm of defence locally long after it had ceased to be an effective military force. There had long been, and still was, a deep-seated prejudice against a standing army. A standing army was "of the Crown"; the militia, with all its failings, was "of the people." Montesquieu said in a familiar passage that, in order that the executive power of the people should not have it in its capacity to oppress the people, it was requisite for the armies with which it was entrusted to consist of the people and be of the same spirit with the people.[67] Judged by this yardstick the old unreformed county militia was the ideal military body. Locally raised, locally engaged and locally officered, it could never be used to subvert the Constitution. The militia in fact possessed all the merits and virtues of a military body—all except one; it was not efficient. Furthermore, it could not be made efficient, at least not in the middle of such a crisis.[68] Now, it lacked arms, it lacked equipment, it lacked

[67] *L'Esprit des Lois*, Bk. xi, ch. vi.
[68] For Pitt's reforms in a later crisis, see 30 Geo. 2 (1757), c. 25.

training and experience, and it lacked competent field officers. "Our Forefathers would have thought that there was great Safety in the Militia"[69]—but on the contrary! "I believe it will be right to have the Men put in readiness, tho' I believe they will not be of much use,"[70] said the Duke of Devonshire, Lord Lieutenant of Derbyshire. "I am afraid your Grace will find the Militia in the northern countrys much in the same way," said the Lord Lieutenant of Cumberland and Westmorland; "little service can reasonably be expected from this Militia."[71]

"It would be an expense to ye county without any good effect,"[72] reported Lord Irwin for the East Riding. "Raw and half-armed as they are, I have not any great opinion of their Usefullness,"[73] said Lord Derby for Lancashire. This opinion was quite widely held; notwithstanding this, however, and notwithstanding also the keen awareness of the legal and other difficulties, the Lords Lieutenants in general seemed inclined to favour an attempt to make a general muster. It was those men who must sign the notices and demands, that is to say, the Deputy Lieutenants (who incidentally were mostly also justices), who were not so enthusiastic. In Durham, for example, the various gentlemen met at Durham Castle in the middle of September, "and sent a Summons throughout the County for a General Meeting on Monday next [the 23rd]. They have given notice to the Militia to appear ye 25th," but still the old objection "sticks with them."[74] Lord Malton for the West Riding was early of opinion that the Lieutenancies "will not avail such real security for our Government."[75]

Yet in certain of the counties they were not averse to utilising the machinery of the Lieutenancy or some other

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[69] SPD, 70/60.
[70] *ibid.*, 67/90.
[71] *ibid.*, 67/77.
[72] *ibid.*, 67/52.
[73] *ibid.*, 68/101.
[74] *ibid.*, 68/80.
[75] *ibid.*, 67/40.

machinery in a somewhat irregular manner in order that the muster in some form or other should be as prompt and as numerous as possible. For example, the Lord Lieutenant of Sussex (at a time when a French landing was fully expected) summoned his deputies to a Board of Lieutenancy at Lewes and proposed they should elect out of their own body 12 gentlemen, "six out of the Western rapes and six out of the Eastern, each of them to take the command of a Company"—but a company not of the militia, but of the "troops and companies" raised by "special commission." [76] Or again in Northumberland, where the situation was of course even more critical and urgent, the militia was called out by Order-in-Council of September 5 [77]; but whatever the difficulties were with the militia, in Newcastle in the middle of the month the sheriff was directed "to raise the Posse Comitatus of the Town and County"—a body, if anything, more ancient than the militia—a summons to which all men between 15 and 60 were liable; "and when they were gathered to the number of several thousands [gathered that is to say in the capacity as a posse comitatus] it was proposed to them to enter into a voluntary engagement, each to furnish an able man with arms for Defence of the Town." [78]

It is clear then that, although the Lieutenancies in general felt themselves impeded by certain not fully understood legal difficulties, they were not above adopting even "irregular" subterfuges in their efforts to perform their primary function, namely to raise the men of the county in time of threatened insurrection or invasion.

Thus, not only were Courts of Lieutenancy called in the City of London and Boards of Lieutenancy in the counties, but in certain counties the neighbouring Lords Lieutenants concerted and consulted together, in correspondence and in the flesh, and met informally and in a way not regularly provided for in the normal Lieutenancy

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[76] Newcastle pp., f. 262.
[77] SPD, 67/47.
[78] *ibid.*, 68/81.

procedure. The Earl of Cholmondeley, for example, the Lord Lieutenant of Cheshire and some of the northern counties of Wales, wrote from London in very friendly terms to the Earl of Derby, the Lord Lieutenant of neighbouring Lancashire, with regard to the King's warrant to raise companies outside the Lieutenancy procedure. Lord Cholmondeley expressed himself anxious lest there should be " any Implication of Supiness or Neglect." [79] This was a course which the family of Stanley might well very much appreciate after the earlier rivalry—not to say unpleasantness—regarding the Lieutenancies of Cheshire and Lancashire, and in the political uncertainties of the latter end of the previous century.[80] Or again, in the middle of September for example, the Archbishop of York, the Earl of Malton Lord Lieutenant of the West Riding, Viscount Lonsdale Lord Lieutenant of Cumberland and Westmorland, Sir John Ramsden the member for Appleby in Westmorland, Sir James Lowther the member for Cumberland, and Frankland the member for Thirsk, and others, all met at York and convened a general meeting.[81]

And again, within a week the Lords Lieutenants of the East and West Ridings, Cumberland and Westmorland, the Earls of Carlisle, Scarbrough and Galloway, with their special interests in Cumberland, Durham and north of the Border, and Viscount Downe and Lord Fitzwilliam, all met in conference in York.[82] According to the Archbishop's letter to the Lord Chancellor,[83] General Oglethorpe, " who is very alert, was to collect our Lord Lieutenants and their forces together," and was to co-ordinate on the operational side, much as His Grace apparently was attempting to co-ordinate on the administrative. The practical and physical difficulties, the legal impediments and other features of the situation, were discussed in the various counties then, and the Ministry in London were given the general feeling.

[79] Record Office, Preston: DDK/1741/21, September, 1745.
[80] *Kenyon MSS.* (Hist. MSS. Com. 14th R. IV), 205–207 and 219.
[81] SPD, 68/17 and 26.
[82] *ibid.*, 69/12.
[83] G. Harris, *Life of Lord Chancellor Hardwick*, II, 176.

The Council in London approved and issued a proclamation which explicitly admitted with regard to the militia that "the law in this case was difficient." [84]

Alternative methods of raising men would be adopted. Yet the Ministry, torn within by feud and faction, as the confidential correspondence now shows and the later ministerial reshuffles openly advertised, would not take the responsibility of deciding what particular course should be adopted in the counties to the exclusion of the others. Initially they were quite uncertain and legally and constitutionally completely in a fog. When the Lieutenancy of the West Riding held themselves "very ready to express the Duty and Affection to His Majesty, and therefore desire your Directions as to the proper manner of doing it [as] the usual Form . . . will not avail," [85] the Secretary of State admitted having received the same representations from other Lieutenancies and said in reply, "as soon as we can settle amongst ourselves what is proper to be done, I will immediately acquaint you with it." [86]

At home, an insurrection; from abroad an invasion; an insurrection and invasion which were threatened and expected last year, and also the year before—and the Government itself does not know "what is proper to be done"! They will "immediately acquaint" their supporters "as soon as we can settle amongst ourselves."

The more the Ministry deliberated, the less able they were, apparently, to come down in favour of any particular method. What they ultimately decided to do—if it can be called a decision at all—was to draw up additional commissions to raise men and form them into companies, and to issue them to the Lords Lieutenants, who were already of course armed with authority—for whatever use they could make of it—to raise the militia, "the law in that case being deficient" or not. The method "agreed upon to be taken for Empowering and Authorising the Lord Lieutenants,

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[84] SPD, 68/17.
[85] *ibid.*, 67/40.
[86] *ibid.*, 67/45.

or other Lords that may be so disposed, to raise any regiment or Number of Men," was by Royal warrant. The notification to the counties to this effect was followed by a note of apology—or impotence—which closes so many of the communications of the council at this period :

> This is the only Method the King's Servants could suggest for the purpose proposed, and is agreeable to what was practised in 1715.[87]

It is to be noted, first that the authority to form companies was to be by Royal warrant, an arrangement which is altogether outside what is ordinarily understood as the Lieutenancy procedure, secondly, the new power and authority under Royal warrant were not to be confined to the Lords Lieutenants, but were to be extended to such " other lords that may be so disposed." This itself might be expected to weaken the power and to lessen the status of " the King's Lieutenant in and of the county " ; it would moreover be more likely, particularly in certain counties, to widen the breach between some of the baronial and manorial families than to close it. Thirdly, the authority to raise companies appears by the terms of the letter from the Secretary of State to be confined to " the Lord Lieutenants or other Lords that may be so disposed " ; but in point of fact Royal warrants were addressed not only to the Lords Lieutenants (Cumberland and Westmorland, Northumberland; East Riding, Lincoln, Shropshire, and so forth)[88] but also to the mayors and provosts of cities and boroughs (Carlisle, Liverpool, Newcastle, Berwick, Glasgow, Edinburgh, and so on).[89] This procedure would inevitably sharpen any difference, or convert into active any latent opposition, that there might be between the boroughs and the general body of the county. This in particular was tested in action at Carlisle, and although in the main the only hitherto easily accessible accounts which have come down to us in respect of the city are all from a very

[87] *ibid.*, 67/98.
[88] *ibid.*, 68/66, 72 and 119.
[89] *ibid.*, 68/98; and Tweeddale LB. ff. 255, 259 and 275.

prejudiced source, it is not difficult for any eye trained to weigh evidence to discern what must have been the true state of affairs there between the Lieutenancy and the regular Commission of the Peace of the county on the one hand, whose mouthpiece was Chancellor Waugh, and the city magistracy and municipal body on the other, whose mouthpiece—and scapegoat—was the Deputy Mayor, Thomas Pattinson.[90] The fourth and last point to be noted in the Secretary of State's letter to the Lords Lieutenants is that the method proposed was to be according to precedent—it was "agreeable to what was practised in 1715." One might have imagined in any case that "what was practised in 1715" would not have come down to 1745 with any very high recommendation to either side.

So far as concerned the Lords Lieutenants, the power under these additional commissions the Lieutenants could invoke—and this is the remarkable feature—at their own preference or where their respective counties refused, declined or otherwise omitted to raise the constitutional militia ("the law in that case being deficient"). In other words, in the state of legal and constitutional doubt which had been allowed to arise the Ministry came to no real decision but passed the undecided issue on to the counties for them to take the responsibility locally.

The council therefore addressed themselves to the Lords Lieutenants of the northern counties:

> The Deputy Lieutenants of the County of Northumberland having represented to the Earl of Tankerton, on Occasion of the Order lately given out for the Militia of the County to be put in a Readiness for immediate Service, That they are apprehensive they shall not be able to raise Subsistence Money to pay the Militia, the Act of Parliament of the Seventh of His Present Majesty having expired in the year 1735: and it being probable that the same Difficulties may arise in the other Northern Counties . . .; the King thinking

[90] See my comments on this in the forthcoming edition of the Cumberland records.

> it absolutely necessary, That the Lord Lieutenants of those Counties should have a legal authority to put them in a Condition of Defence in this time of Danger; his Majesty has ordered me to transmit to your Lordship the enclosed warrants authorising and empowering your Lordp in the several counties . . . to form into Troops or Companies such Persons as shall be willing to associate themselves.[91]

There followed the usual pathetic note at the close: " or if you can suggest any other method that may be more agreeable to the County that you would have the goodness to let me know it." [92]

This was confusion enough to introduce into the body of the Lieutenancies; but most critical was the opposition (or the differences) introduced or fostered between the Lieutenancy of the counties on the one hand and the magistracy of the boroughs and cities on the other, by authorising the latter by Royal sign manual, in effect at their own option, to raise their own companies altogether independent of the county militia and the Lieutenancy. Anyone could contract out. It is not surprising therefore that we find a fair pickle at Liverpool, and fine stew in Durham and Newcastle, and a real kettle of fish at Carlisle. The affairs of the nation might be pressing, but at Liverpool more " urgent affairs called Owen Pritchard, Mayor, into Wales for a week." [93] In Carlisle, " young Mr. Aglionby, the real mayor, never came into the town." [94]

In Durham the Bishop, who was not a great deal of use as a Lord Lieutenant, was a good deal less as a convener of independent companies. My Lord Bishop fumbled round for some unobjectionable verbal formula; " You probably have a *form* by you . . . : it will be a favor to lend me a copy thereof by Bearer "; " I am at a loss to know . . ." whether I commission the gentlemen jointly or severally;

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[91] SPD, 69/95.
[92] *loc. cit.*
[93] SPD, 69/95.
[94] Mounsey, *op. cit.*, 59..

must the instrument " be writt upon unstamped paper, or a triple sixpenny stamp? " [95] Nottingham pleaded the Royal warrant was no use to the city; it named the mayor as at a certain date; and the gentleman named could make no use of it as he " was out of office before the commission came down," and the new mayor could make no use of it either " for he did not enter upon his office, neither was he elected," by the date noted.[96]

In general, however, most of the critical counties seem to have favoured forming the men into companies rather than mustering them as a militia, although in many cases the arguments used against the militia would have applied equally against the companies—shortage of arms, absence of equipment and lack of experienced field officers. The West Riding would make use of the power by Royal warrant " preferably to making use of the Militia." [97] Lancashire, however, although " not ignorant of the difficulties of raising the Militia as the law now stands," much doubted " whether better Men can be had in any other way." [98] Cumberland and Westmorland were more decided. Lord Lonsdale said the Deputy Lieutenants had " proceeded in this service with great chearfulness and as much expedition as the Nature of the thing admitted." He thought it therefore " most for his Majesty's Service that they should continue to provide in the same Manner," which in any case " is the only one they have been acquainted with." If this method of raising the counties were objected to, he did not apprehend how they could be raised in any other way.[99] No force worth mentioning could be raised by subscription —a fact which experience in Lancashire tended to confirm, for when certain of the commonalty learned that it was doubtful whether the militia pay and subsistence were a lawful charge upon the county, they were disinclined—

[95] SPD, 68/104.
[96] *ibid.*, 69/110.
[97] *ibid.*, 68/17.
[98] *ibid.*, 68/101.
[99] *ibid.*, 69/11.

some of them—to pay the "subscriptions" which circulated, for they tended to regard it as an illegal levy being imposed in a less objectionable guise.[1] Cumberland and Westmorland, therefore, would issue the special commissions if such were specifically requested—and none had been requested as yet—but on the whole the Lord Lieutenant feared he would have no opportunity to exercise the power the King had been pleased to entrust to him.[2]

It seems then that the Ministry in London, by declaring that "the laws in this case [of the militia] being deficient," had confused not only the Lieutenancy but also the counties at large, and by setting at sixes and sevens the counties in general and sometimes the separate interests within the same county, had made the confusion a lot worse confounded.

The fourth problem remains to be considered, namely why it was that in these counties where the militia was in fact embodied, as for example in Cumberland, Westmorland and Lancashire, it was stood down again before the enemy's advance without having been brought to any effective action? The problem here cannot of course be fully grasped without some understanding of the previous points. First of all, an order had gone out to the Lords Lieutenants for the militia of the counties "to be put in a Readiness for immediate service." Upon it being pointed out, particularly from the northern counties of England, that there was reasonable doubt about the legal power to muster and subsist them, the Ministry admitted that they for their part were in the circumstances unable to "settle amongst themselves what was proper to be done." They issued a proclamation, securing its wide publication in the local county news-sheets,[3] admitting that "the laws in this case were deficient." They then somewhat belatedly secured the passage of a short Act with the intention to remove the difficulty, but the amending Act by faulty

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[1] Record Office, Preston: DDK/1741/29, October, 1745. (There are a number of papers here of considerable interest on the subscription.)
[2] SPD, 69/11.
[3] *cf. Manchester Magazine.*

drafting succeeded only in still further confusing the situation. Then they pitched upon certain alternative methods of raising forces, altogether outside of that procedure (*i.e.*, the Lieutenancy), which was acknowledged to be the historical and constitutional command in the county against insurrection and invasion.

Yet notwithstanding all this hesitation, vacillation and incompetence in London, the counties most vitally concerned did in fact, in spite of all these and other difficulties and discouragements, raise their county levies, and furthermore raise them in the constitutional manner—namely in the form of a county militia. After the fall of Edinburgh and the battle of Prestonpans the Jacobites' advance into England was longer delayed than had been expected: they crossed the Border on November 8. By this time the militia had not only mustered locally and taken up their stations—and this despite the legal doubts as to their liability to answer that call—but they had furthermore remained mustered at a charge upon their own local funds, even beyond the period of doubt. Notwithstanding all this, the Cumberland militia took command of the vulnerable and strategic points in Cumberland,[4] and although it had been doubted whether the county militia could legally be marched beyond the confines of their own county, the Westmorland militia did in fact move up into Cumberland to assist. On October 17—the Jacobites were as yet at Edinburgh—the officer commanding the Cumberland militia foot in garrison at Carlisle, the officer commanding the Westmorland foot, the colonel of the militia light horse, and the recorder of the city to represent the civic interests, sent an urgent appeal to the Lord Lieutenant. This appeal was not for a ruling as to their constitutional liability to

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[4] For an account of these stations, see Cumberland Lieutenancy Book (ff. 31 and 35, September 21, 1745).

Some doubt emerges from a study of the papers as to whether the Cumberland and the Westmorland militia were a joint or several body, that is to say, whether Viscount Lonsdale exercised his Lieutenancy of the two counties jointly, or the two counties severally. See my notes in the forthcoming Cumberland County Record Series, *The Jacobite Risings of* 1715 *and* 1745.

serve beyond the expiry of "the initial period" but an appeal for directions as to how the money could be raised to keep the troops longer embodied.

They had already served the statutory period of a month. A somewhat similar situation had arisen in the 'Fifteen. Lord Loudoun—another of the powerful Whig clan of Campbell—had then expressed to the Law Officers of Scotland the doubts which were felt even at that time as to the legality of holding the militia embodied after the expiry of the one month's initial period. This whole matter was then discussed between the Law Officers themselves as one of genuine doubt and difficulty. Lord Loudoun, as Mr. Burn has shown, was rewarded with a legal and historical disquisition from the Lord Advocate, who gave it as his opinion that the militia did in fact owe service beyond the initial period but that it was "a greater question who should subsist or provide them." He thought therefore that the Government should. The Lord President, concurring with that view, said that in his opinion the county should provide them for the further period; he recognised, however, that even so it "has been questioned whether they could be detained longer if the government were willing to subsist them." [5]

It is a noteworthy fact that this doubt which had arisen in 1715 had during the years between 1715 and 1745 never been resolved. It is also to be noted that in 1745 the Cumberland and Westmorland militia did not demur, as certain other counties had done, at being embodied in the event of invasion or insurrection or threatened invasion or insurrection; furthermore they appear to have raised no particular scruple even at mustering at a cost to the county; notwithstanding the genuine doubts as to the legality of that service. They even went so far as to offer to serve beyond the expiry of the initial period, and did in fact serve

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[5] W. L. Burn, "A Note on Militia Service in Scotland in the 'Fifteen," *Juridical Review*, March, 1936 (XLVIII, No. 1), 45–47.

beyond the statutory month.[6] All they asked for was the money necessary to keep the muster going. The joint letter from Carlisle of October 17 read:

> The Militia is raised and are now, a great part of them in this Garrison, where Its presumed they may be of great Use in case Ye Enemy make any attempt here, and by defending this place be of good service to ye two Counties. But as we apprehend the Counties are not chargeable with above a month's pay and as that Month will Expire on ye 24th Instant, and as the Rebellion is still subsisting and ye disbanding of Militia before that is quash'd may be of ill consequence, we therefore beg Your Lordships's Advice and Direction how in this critical juncture we ought to proceed. Whether to let them all go home or keep 'em together.[7]

As already stated, the Lord Lieutenant would not take the responsibility of advising them to what he conceived to be an illegal course of action. Like Argyll he saw no reason, notwithstanding "the inconveniencys arising to the government," why he should "subject himself to penaltys and trust to pardon." The Secretary of State consulted the Lord Chancellor who said perfectly frankly that in his view they had already gone beyond the law: the Government now should at least subsist them.[8] In the meantime, at Carlisle means were found to keep them together at least a few days longer. The officer commanding the garrison, Lieut.-Colonel Durrand, had to go begging locally for enough money to pay and subsist his men. A meeting of

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[6] As to the confusion caused later in the matter of the settlement of pay, see Cumberland Quarter Session Petition Rolls, Easter, Midsummer and Michaelmas, 1746. In the case of the Cockermouth Company, for example, because the men could not get any pay otherwise, the commanding officer paid them out of his own pocket. Later—some time later—the county paid the men, and as by this time the rising was all over and the men dispersed, the company commander said he would not go to the trouble of recovering the money from the persons separately: he would make them a present of it—whereupon the county indicted the men concerned for having been paid twice, and improperly and *fraudulently* claiming money from the county in respect of a service for which they had already been paid (Cumberland Quarter Sessions Minute Books: indictments: Midsummer, 1746, 352–354).

[7] SPD, 72/34.

[8] Newcastle pp. 290.

the gentry was called " to think of some means of keeping up the militia some time longer." The Colonel offered to subscribe 50 guineas himself out of his own private money. Later an order was drawn up for the clerk of peace to advance the cost out of the county stock to pay the militia, and various county gentlemen countersigned the order " and hereby engaged themselves to be answerable for the repayment of it." [9] This held the garrison together at least for the present. But with IOU's and general undertakings the ordinary run of men can get fed up—but not fed.

Their legal period—if it *were* legal—expired on October 24. Means were found to keep them together until the 31st. In reply to the Lord Lieutenant's urgent request for directions, the Secretary of State replied that " the Publick should rather Pay the Expence than that the Militia should be disbanded at this time " ; to which the Lord Lieutenant replied, " Indeed, My Lord, I should hope that it will be thought that these Poor People deserve some Recompence." [10]

The Jacobite force did not appear before Carlisle until Saturday, November 9. Notwithstanding all the circumstances, the militia determined to defend the town and castle till assistance should be at hand from the regulars at Newcastle. An " express " was hurried across to Wade who commanded the Government forces there.[11] This was on Saturday, November 9. On the Wednesday a reply from Newcastle arrived at Carlisle. It confessed that it was not in Wade's power to come to Carlisle. It was not possible for the regulars to come to the assistance of the militia. " By the direction of the letter," says the commanding officer there, " it was brought to me in that public Manner that it was impossible to conceal it." [12] The cat was out of the bag.

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[9] PRO: Judge Advocate General: Court Martial Proceedings, 71/19, ff. 288–315; and Mounsey, *op. cit.*, 72–83.

[10] SPD, 72/121.

[11] PRO: J.A.G.: Ct. Mar. Proc. 71/19, ff. 296–297, 299–300 and 223–224: or Mounsey, *op. cit.*, 75–76 and 87.

[12] PRO: J.A.G.: Ct. Mar. Proc. 71/19, f. 299; or Mounsey, *op cit.*, 76.

From the outbreak the militia had received from the Government no unequivocal authority; no pay, no subsistence,[13] and now no assistance either. Can it be wondered at that they did what they must have thought most other reasonable men would have done in the circumstances? They went home, where they might very well have been for the last seven weeks, for all the use the Government had made of them.

Further south, in Lancashire, as soon as reliable intelligence was received that the invaders were approaching the confines of the county, the Earl of Derby, the Lord Lieutenant, " thought it advisable to order out the Militia, with 14 days' pay, being all the strength we have." The Lancashire militia therefore on these orders mustered on the southern side of the county " to be ready to give the little assistance in our power to Marshal Wade, who we hoped would have marched out to our relief thro some parts of Yorkshire." It became clear that the regulars could no more march from Newcastle to the support of Lancashire than they had done to the support of Cumberland or Westmorland, and it was clear furthermore that Ligonier's 15 regiments to the south could never march north to meet the invaders in any part of Lancashire. The militia was " very unfit for service, without an Officer capable of commanding, and without most of the conveniences and necessities of an Army."

Furthermore, as the Lord Lieutenant reported, " our 14 days' pay (which being known not to be strictly legal, was unwillingly paid by some towns) will expire on the 25th [of November] which I fear is sooner than the King's troops can arrive among Us." The Lord Lieutenant insisted that they had already " done what in strictness of Law we cannot justify," but hoped that the " restraining provision " would

[13] It is usually overlooked that Carlisle at this time were subsisting also the remnants which escaped from Prestonpans, likewise without any assistance as yet from the Government. What help they wanted in this respect they were advised they could look to Newcastle for. They were soon to learn to their cost what they could expect from Newcastle (SPD, 65/45, 72/34).

be " speedily removed," " otherwise we shall be obliged to let the Men go home at the end of the 14 Days." [14] That was on November 15. Someone else was not prepared, notwithstanding the inconveniences to the Government, to incur the penalties and trust to a pardon.

In point of fact the invaders did not arrive at Burton on the Lancashire border until the 23rd. In the meantime the Government had done nothing. The militia went home.

We might therefore conclude that :

(1) At the outbreak of the rising certain counties had been left without Lords Lieutenants actually in office, not so much by oversight or omission but as a matter of political manoeuvring between the particular factions among the Whigs ; and in its outcome this fact redounded to the considerable disadvantage of the Whigs as a whole. (2) The grounds upon which it was widely doubted whether in 1745 the county militia could be mustered without further specific statutory warrant, were that the Act of 1734 (which set aside the provision that the militia could not be drawn into actual service until the month's pay formerly advanced had been repaid) had expired in 1735, and hence it was not now legal to muster that force until the month's pay had in fact been repaid, or the restraining provision again legally set aside, or some other form of legal warrant obtained. (3) Other methods of raising the county levies were resorted to because the Ministry seemed uncertain : (a) whether the above was a correct statement of the law, or (b) whether in fact they had already removed the difficulty by the Act they procured for the purpose, or (c) whether on altogether other grounds (*e.g.*, arms, equipment, discipline, officers) some alternative force would not be preferable to the county militia. And (4), those units of the county militia which had in fact mustered in face of the invasion dispersed again, partly because they could find no agreed way to raise the money for their pay and subsistence ; partly because they found they could expect no support from the regulars

[14] Newcastle pp., f. 314.

(either Wade in the north or Ligonier in the south), and were altogether insufficiently armed, equipped and officered to stand alone; and partly because, even allowing the legality or otherwise of the "initial period" (which was both disputable and disputed), the force would be standing under arms *beyond* the "initial period," that is to say, any resistance of theirs to the Jacobites might very well be held to be illegal by the Whigs—let alone by the Jacobites.

In any case it had not yet become clear who would finally surrender to whom at Carlisle, nor whose heads in a few months' time would be stuck on a pole over the gates.

RUPERT C. JARVIS.

RECENT LEADING SCOTTISH CASES

By David M. Walker, m.a., ll.b., Advocate

The increasingly international character of modern society is reflected in the increasing frequency with which foreign decrees come to be canvassed in Scottish cases. There have been two quite recently. The first of these is *Warden* v. *Warden*, 1951 S.C. 508; 1951 S.L.T. 406. A wife obtained in 1947 decree of divorce in Nevada on the ground of mental cruelty. She remarried and the husband, who averred that he had been domiciled in Scotland throughout, sought to divorce her for adultery, on the basis that the Nevada decree was ineffective for want of jurisdiction. The defender, however, pleaded that the extension of the ordinary grounds of jurisdiction in divorce by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 2, from domicile to residence in certain cases required the Scottish court to concede a similarly extended jurisdiction to the Nevada court. This argument was rejected, the 1949 Act having made no provision for the recognition of foreign decrees. The courts then adhere to the previous conception of recognising the validity of foreign divorces only where the decree proceeds from the court of the husband's domicile or is a decree accepted thereby. So far so good, but this doctrine, sanctified by practice and precedent, reveals the difficulty that a decree of the Scottish courts, proceeding under the 1949 Act, might not be accepted abroad in a case founded on facts the converse of *Warden*, *i.e.*, husband domiciled elsewhere, wife resident, divorcing, and remarrying in Scotland. This leads to the doubt whether the 1949 Act, however expedient to relieve the consequences of broken war-time marriages, should have been made permanent. It constituted a breach with long-standing principle, unchallenged since *Le Mesurier* [1895] A.C. 517, and possibly should have been only temporary. If a decree is not to be universally valid, it is merely a breeding ground for confusion.

DIVORCE—Statutory extension of jurisdiction—Whether similar extension to be conceded to foreign Court.

The other case raising the matter of a foreign decree was *Simpson's Trustees* v. *Fox*, 1951 S.L.T. 412. It was held there that a decree of presumption of death obtained in Ohio was not acceptable evidence in a Scottish multiplepoinding, but that the death had to be presumed by Scottish proceedings. The ground was that the date of presumed death was a matter of fact in a Scottish process which could not be determined by proceedings in a foreign court.

FOREIGN DECREE—Presumption of death—Whether admissible evidence in Scotland.

By far the most interesting recent case has been that of the *Inland Revenue* v. *City of Glasgow Police Athletic Association*, 1952 S.L.T. 136, which raised issues international and constitutional as well as financial. The Inland Revenue sought to tax the Glasgow Police Athletic Association on the profits of the annual police sports held at Hampden Park, in which prominent athletes take part and to which the public pay to obtain admission. The police contended that their association was a body " established for charitable purposes only " and thereby exempt from income tax. The Special Commissioners upheld this contention and on appeal, the Court of Session, sitting as Court of Exchequer for Scotland, though opposed on principle, found themselves unable to reverse the Special Commissioners on a remarkable ground. It was that Revenue statutes have admittedly to be interpreted in the same way in both England and Scotland to secure an equal incidence of taxation, but they are drafted in English legal terms which do not necessarily convey the same implications in both systems of law. In particular a " charity " is a very different thing in the two countries. In recent years the Chancery Division have held to be charitable many bodies and purposes which would not be held so in Scotland, and the court held that it did not know what charity meant, as interpreted in England, and had therefore not the knowledge to reverse the Special Commissioners when the latter had not patently gone wrong in law.

REVENUE—Exemption from Income Tax—Whether " charity " to be determined by Scots or English law.

The implications of this decision are serious. If the Court of Exchequer in Scotland cannot decide a question of " charity "

under the Income Tax Acts, must such questions go to the Chancery Division, or direct to the House of Lords, which knows both systems of law? If the Income Tax Acts would but define "charity," even in terms consonant with the Chancery interpretation, the Scottish court could deal with the matter. As it stands this impasse requires legislation. It is interesting that even in England the necessity for a statutory definition of charity has been stressed: Bentwich, "The Wilderness of Legal Charity," (1933) 49 L.Q.R. 520; *cf.* Brunyate, "The Legal Definition of Charity," (1945) 61 L.Q.R. 268. This necessity is now clamant.

The difficulty arises from several sources: the admitted desirability of having the incidence of taxation equal as between England and Scotland, the legislative habit of providing for a situation in terms apposite to England but not to Scotland, and, not least, the nonchalant way in which some former Lords of Appeal have laid down that the law of Scotland was the same, or substantially the same, as that of England. Thus in *Baird's Trustees* (1888) 15 R. 682 (income tax) and *Moray's Trustees* (1905) 7 F. (H.L.) 122 (estate duty) the Scottish courts have been enjoined to give English law terms application to Scotland as words of ordinary significance. This is really an impossible course in the case of "charity" which has in England a long history stemming from the statute of 43 Eliz. c. 4, as expanded by analogy and subsequently widely interpreted in the Chancery courts. In *Pemsel* [1891] A.C. 531, in which Lord Macnaghten made his famous quadripartite classification of charities, Lord Watson said that the meaning then assigned to charity should be ascertained by English law and that its meaning was substantially the same in both countries. Whatever may have been the case in 1891, the latter branch of this is manifestly untrue now if one looks at the list of accepted charitable objects found in *Snell* (p. 109) or *Hanbury* (p. 232) or *Halsbury* (IV, sec. 162). In Scotland the root meaning of charity is the relief of poverty, and *pace* Lord Watson, the Scottish courts would not for a minute consider many of these English purposes charitable in any other connection. Must they then consider them charitable for revenue purposes?

It is remarkable that 60 years have elapsed before the interpretation of the dicta in *Pemsel* have become crucial, though in several cases the courts have just managed to evade the issue.

Thus in *Jackson's Trustees*, 1926 S.C. 579, 588, Lord Sands seemed to find no difficulty in ascertaining what the law of England was as to charities and applying it to a Scottish deed. In the present case the issue could not be avoided. It is to be hoped that the case will go to the House of Lords, not so much to have the question of exemption from taxation determined as to know by what law " charity " is truly to be interpreted in these cases. We hope the Scottish Lords of Appeal will prevent their brethren from giving us any foolish dicta about the identity of the conception in the two systems of law. If the Court of Session must follow Chancery decisions on charities for revenue purposes, how can the judges pretend to a sufficient knowledge of the intricacies of English equity to interpret those decisions?

Ramsay v. *Wimpey*, 1952 S.L.T. 46, is an important case for employers. In this case the employers gratuitously provided bus transport to and from Edinburgh for employees engaged on a building site at Grangemouth. The pursuer's husband was killed when a group of employees, eager to get home, rushed a bus and crushed him against the front wheel. The basis of the action was " faulty system of working " in not making arrangements for stewards and crowd-barriers where the buses stopped. In the result the salutary and reasonable decision was that system of working extended only to " the practice and method adopted in carrying on the master's business " and not to the arrangements for transporting workmen before or after the day's work, though still at those times in the master's employment. As Lord Patrick pointed out, acceptance of the legal duty contended for by the pursuer would impose a quite intolerable burden on employers and extend their responsibilities far beyond the operations of the employer's business.

NEGLIGENCE —Extent of duty to provide safe system of work.

Lord Wright's article (14 Mod.L.R. 393) has brought *Re Polemis* [1921] 3 K.B. 560 into the limelight again, and about the same time *Malcolm* v. *Dickson*, 1951 S.C. 542; 1951 S.L.T. 357, has illustrated a fallacy very common in Scottish cases on remoteness of damage. A dwelling-house was set on fire

NEGLIGENCE —Remoteness of damage.

owing, it was averred, to the negligence of a painter with a blow-lamp. A guest sought to salve certain valuables and collapsed and died while so engaged. The defenders pleaded successfully that the death was not a reasonable or probable consequence of the alleged negligence. But there appears to have been some confusion at the debate arising from insufficient appreciation of the vital distinction between (*a*) the limitation of liability and the duty of care to those consequences which are proximate, *i.e.*, reasonably foreseeable as natural and probable consequences of the initial fault, and (*b*) those consequences which, there being an admitted or proved fault and consequent liability for negligence, are too remote to sound in damages as not being the direct, or possibly the natural, or possibly even the reasonably foreseeable consequences of that fault.

Bourhill v. *Young*, 1942 S.C. (H.L.) 78 only dealt with problem (*a*) though (*b*) was adverted to: *Re Polemis* only dealt with problem (*b*). The rubric " remoteness of damage " in this case tends to mislead in that this case was one raising problem (*a*), and not (*b*) at all—not so much remoteness of damage as liability, the question whether the death could be related as a proximate consequence, sounding in damages, to the cause alleged by the pursuer. It could not, tested by the legal criterion that responsibility for the consequences of an act was limited to the reasonably foreseeable consequences thereof. This habit of giving the rubric of " remoteness of damage " to cases of proximate cause has led in the past to much confusion in Scotland. *Glegg*, for example, does not draw the distinction at all.

RECENT LEADING ENGLISH CASES

By W. A. Elliott, m.c., b.l., Advocate, and of the Inner Temple, Barrister-at-Law

JUDICIAL PRECEDENTS —Weight of Authority given by English Courts to Scots Decisions.

The weight of authority to be given in English courts of first instance and the Court of Appeal to decisions of the Inner House dealing with United Kingdom statutes, has been commented on in some recent English cases. In an estate duty case, *Re D'Avigdor Goldsmid* [1951] 1 Ch. 321, 332, Vaisey J. said: "I was urged to consider *Lord Advocate* v. *Hamilton's Trs.* 1942 S.C. 426 as concluding the matter so far as I am concerned in the plaintiffs' favour. I accept that view and hold that the claim under this head is precluded by that authority. *Re Hartland* [1911] 1 Ch. 479 and *Brooks* v. *Inland Revenue Commissioners* [1913] 3 K.B. 398 are to the effect that it is my duty in a court of first instance in England to follow a unanimous decision of the Court of Session on a statute equally applicable to both countries." On appeal ([1951] 2 All E.R. 543), the Court of Appeal reversed this part of Mr. Justice Vaisey's judgment and refused to consider themselves bound by Lord *Advocate* v. *Hamilton's Trs.* Sir Raymond Evershed M.R., however, who read the joint opinion of the court in that case, has also made the following observations in a recent rent restriction case, *Regional Properties Co., Ltd.* v. *Frankenschwerth and Chapman* [1951] 1 K.B. 631, 637 (C.A.), where his Lordship said: "I am supported in that opinion by the view taken by the Inner House of the Court of Session in *Dalrymple's Trustees* v. *Brown* 1945 S.C. 190. It need not be said that a decision of that court is not binding on this court, but since the Acts to be construed are the same in both Scotland and England, and since cases under those Acts go to the House of Lords from both Scotland and England, it is plainly desirable that the construction of the relevant parts of the Acts should be the same on both sides of the border. I should therefore

always be inclined to follow in cases of this kind the decision of the Inner House." Quoting these observations in another recent case under the Factories Act, 1937, *Thorogood* v. *Van den Berghs and Jurgens* [1951] 2 K.B. 537, 550 (C.A.), Asquith L.J. stated that if the facts before him had been the same as those in *Parvin* v. *Morton Machine Co.* 1950 S.C. 371 he would have followed the decision of the Inner House. The facts, however, were distinguishable.

To sum up, it would seem that courts of first instance in England may be bound by unanimous decisions of the Inner House dealing with United Kingdom statutes, but that the Court of Appeal is not likewise bound as it would be by its own decisions. Decisions of the Inner House on United Kingdom statutes are, however, of very strong persuasive authority in the Court of Appeal.

REMOTENESS OF DAMAGE.

Thorogood has already been commented on previously in this review (Vol. LXIII, p. 89), with regard to the statutory branch of that case. Attention should now be drawn to its common law aspects, for in confirming *Re Polemis* [1921] 3 K.B. 560, to be the law of England, the Court of Appeal has focused attention on a possible differentiation between Scots and English principles.

The defendants had been negligent in placing an electric fan, without a guard, on the floor of an engineering shop for the purposes of carrying out a test which required it to be set in motion. It was not proved exactly how a consequential accident to an electrician testing the fan occurred, or that these injurious consequences of the defendants' initial act of negligence were reasonably foreseeable. It was nevertheless held (following *Re Polemis*) that the injury being the direct consequence of the original act of negligence, the defenders were liable. The criterion of foreseeability was relevant only to the prior question whether or not there was negligence in the first place, and not to the question of consequential damage being too remote. It will be remembered that in *Bourhill* v. *Young* 1942 S.C. (H.L.) 78, 89, Lord Macmillan doubted whether the rule in *Re Polemis* was the law of Scotland, and the views of the learned author of the chapter on "Negligence" in the *Encyclopaedia of the Laws of Scotland* (Vol. 10, p. 281), and *Glegg on Reparation* (3rd ed.,

p. 36) are to the contrary. But the point cannot be regarded as settled. As Sheriff Middleton points out in the last number of *The Juridical Review* (Vol. LXIII, No. 3, p. 282), whatever may be the principle of Scots law, our courts have consistently practised the rule in *Re Polemis* in reparation cases. Meanwhile we await some clarification of the law of Scotland on this important question. The recent case of *Malcolm* v. *Dixon* 1951 S.L.T. 357, of course, only reaffirms *Bourhill* and the principle governing the prior question of liability, and is not concerned (as its headnote indicates) with remoteness of damage.

LIABILITY FOR NEGLIGENT STATEMENTS—Duties of Accountants.

Candler v. *Crane, Christmas & Co.* [1951] 2 K.B. 164, is one of those rare cases in which the arguments stirred the very roots of the common law and the judgments have already occasioned comment in England and America. In the result, however, no new principle of law was decided. The plaintiff was considering making substantial investments in a limited liability company, and for this purpose desired to see the company's accounts. The company's managing director accordingly instructed the defendants, who were his accountants, to press on and complete the accounts, informing a clerk in the defendant's employment that these accounts were required to be shown to the plaintiff as a potential investor in the company. The accounts were prepared extremely carelessly (though without fraud) and contained numerous false statements, as a direct result of which the plaintiff invested his money in the company, and on its being wound up a year later lost his entire investment. The judge of first instance (Lloyd-Jacob J.) dismissed the plaintiff's subsequent action on the ground that the defendants owed him no duty of care. On appeal the Court of Appeal (by a majority) upheld his judgment, Cohen and Asquith L.JJ. (Denning L.J. dissenting) holding that in the absence of a fiduciary or contractual relationship there was no liability for negligent as opposed to fraudulent misrepresentations. Their opinions were accordingly in line with the English authorities of *Le Lievre* v. *Gould* [1893] 1 Q.B. 491, and *Derry* v. *Peek* (1889) 14 App.Cas. 337, and also with Scottish authority (see *Glegg on Reparation*, 3rd ed., pp. 227 and 240). The case is of unusual interest, however, in that the appellant endeavoured to invoke

Lord Atkin's principle of " proximity " in *Donoghue* v. *Stevenson* 1932 S.C. (H.L.) 31, 44, for maintaining that the respondent firm of accountants owed him a duty to take care in making their accounts. Asquith L.J., however, observed (at p. 189) that Lord Atkin's dictum in *Donoghue* had never yet been applied where the damage complained of was not physical in its incidence to either person or property. But in his strongly worded dissenting judgment Lord Justice Denning invoked both Lord Atkin's and Lord Macmillan's broad statements of principle in *Donoghue*, to support his opinion that the respondents, exercising a calling which requires knowledge and skill, owed a duty to use care in their rendering of their accounts, not only to their clients with whom they had contracted, but also to all those whom they knew might rely on these accounts in the transactions for which these accounts were prepared.

DUTIES OF OCCUPIERS OF PREMISES towards those on adjoining public thoroughfares.

The duties of occupiers of premises for defects in their property injuring those on adjoining public thoroughfares, is clearly illustrated in *Caminer and Another* v. *Northern and London Investment Trust, Ltd.* [1951] A.C. 88, where the House of Lords recently affirmed the decision of the Court of Appeal. An elm tree standing on property adjoining a busy London highway, fell and injured certain passers-by. The tree was about 130 years old, was carrying a large but not abnormal crown, and after its fall its roots were found to be infected by a disease known as elm butt rot. It was held that the occupiers were not liable either in negligence or nuisance because the tree was apparently sound and healthy, and the evidence did not establish that inspection by an expert would have revealed that it was dangerous. Lord Reid said, in the course of his speech (at p. 104): " I think that the respondents' duty was to take such steps to prevent danger as a reasonable man in the respondents' position would have taken." This case confirms that to succeed in actions of this nature, an injured party must prove lack of foresight or *culpa* on the part of the defender and is accordingly in line with Scottish authority that there is no liability *ex dominio*.

RECENT PRIVY COUNCIL CASES

CONTRACT TO ALLOT SHARES: Breach: Damages.

Sri Lanka Omnibus Co., Ltd. v. *L. A. Perera* ([1952] A.C. 76; [1951] 2 T.L.R. 1184) was an appeal from a decree of the Supreme Court of Ceylon varying a decree of the District Court of Colombo. The present respondent brought an action against the company for specific performance of an agreement to allot to him shares in the company, and for damages for breach of the agreement. An order for allotment was made, and the District Judge awarded the respondent as damages a sum, equal to 50 per cent. per annum on the nominal value of the shares which ought to have been allotted, from January 18, 1943, to the date of allotment. In the High Court counsel for the respondent admitted that the award could not be supported, and the Supreme Court assessed the damages at a sum equal to 20 per cent. per annum of the nominal value of the shares from January 18, 1943, to the date of allotment. The main question for determination by the Board was the correct method of assessing damages in an action in which the court, having found that the company was in breach of the contract to allot shares to the respondent, had granted an order for the specific performance of that contract.

The Board held that the party complaining of a breach of contract was not entitled to be put in a better position than he would have enjoyed if the contract had been performed according to its terms. When the contract was a contract to allot shares, the aggrieved party's position was fully restored when the shares had been allotted to him under an order for specific performance and he had received the equivalent of the dividends which he would have received if the contract had been duly performed, with interest during non-payment. The Board accordingly held that the respondent was not entitled to an award of damages of more than the equivalent of the dividends at the rates declared by the company between the dates when the shares should have been allotted and the date of actual allotment, with interest on the dividends until payment. The appeal was allowed, the judgments being modified by substituting for the damages

awarded the amount to be calculated on the basis which the Board stated.

EVIDENCE: Admissibility of document.

Thrasyvoulos Ioannou and Others v. *Papa Christoforos Demetriou and Others* ([1952] A.C. 84; [1951] 2 T.L.R. 1177), an appeal from the judgment of the Supreme Court of Cyprus which had affirmed, with a minor variation, the judgment of the District Court of Nicosia, concerned the admissibility of a document which the respondents had tendered in evidence at the trial. By the judgments below the respondents (the plaintiffs), inhabitants of the village of Petra, Cyprus, had been granted an injunction restraining the appellants from the alleged unlawful interference with the water rights of the respondents, to which they claimed by ancient and uninterrupted user. The appeal to the Board related to the admissibility of the document in question, called "Report and Reference of Salim Effendi," dated August 13, 1901, which purported to specify, inter alia, the practice which then existed regarding the taking of water by the inhabitants of various villages, including Petra. Salim Effendi, who had been a surveyor in the Land Registry Office, was now dead. At the hearing in the District Court the document was read in evidence, and the Supreme Court of Cyprus upheld its admissibility.

The appellants contended that it was wrongly admitted. It was produced by a witness from the Land Registry from a file which, he said, related to local inquiries made in respect of Karkotis water. (The respondents claimed to have for their own use the full natural flow of the water of the river Karkotis, including the full flow of two upper rivers which joined it, between certain specified times on certain days of the week at certain seasons of the year.) The witness did not produce any instructions in writing given to Salim, but stated: "It was made on the instructions of the Director of the L. R. O. to register those lands which were sold or purchased and for the other lands to make a note that they have the right of irrigation." He stated that the inquiry was made under Law 5 of 1880. That law gave power to the High Commissioner to direct a survey, and to appoint a Director of Surveys. Section 3 required owners and others to attend and give information when required; section 4

gave power to enter lands for the purpose of survey; and section 8 required occupants to point out boundaries.

The respondents contended that the document was admissible under section 4 of Law 14 of 1946 of the Laws of Cyprus (the Evidence Act, 1946), which corresponded with the provisions of sections 1 and 6 (2) of the English Evidence Act, 1938. Further, or alternatively, that it was admissible as a " public document " under English common law rules of evidence, which were made applicable to Cyprus by section 3 of Law 14 of 1946.

The Board said that the mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred subject-matter did not necessarily make the contents of the file a " continuous record " within the meaning of section 4 of the Evidence Act (Law 14 of 1946). They stated that the dictum of Lord Blackburn in *Sturla* v. *Freccia* ((1880) 5 App. Cas. 623, at p. 643) contained an authoritative statement of the law as to the admissibility in evidence of the class of document in question. Applying that test, it was held that the respondents had not shown, either intrinsically from the contents of the document itself or from other evidence: (1) that a judicial or semi-judicial inquiry was ever held by Salim as to the rights of the appellants to Karkotis water, or as to the conflicting claims of Petra (which village the respondents inhabited) and Kakopetria (which village the appellants inhabited) to such water; (2) that the inquiry which Salim held was held with the object that his report thereon should be made public; or (3) that the report was in fact at all times open to public inspection or that an inference to this effect should be drawn from the fact that it was produced in evidence without objection by the Land Registry authorities. Furthermore, the Board were of opinion that, in any event, it had not been established that it was any part of the duty of Salim to record the matters set out in the opening paragraphs of the Reference (Report and Reference of Salim). And they considered it implicit in the authorities (and was expressly stated in *Nothard* v. *Pepper* ((1864) 17 C.B.(N.S.) 39, at pp. 49 and 52), and *Att.-Gen.* v. *Antrobus* ([1905] 2 Ch. 188, at p. 194)) that the statements in a document tendered in evidence as a public document should be statements with regard to matters which it was the duty of the public officer holding the inquiry to inquire into and report

on. The Board were accordingly of opinion that the document was wrongly admitted in evidence. The appeal was allowed and the action remitted to the District Court for a new trial.

SETTLOR: Charitable trust: Death duty.

In *Commissioner of Stamp Duties of New South Wales* v. *Way and Others* ([1952] A.C. 95; [1951] 2 T.L.R. 1239) the appellant contended that clauses 3 and 24 of a trust brought the trust fund within the charge to death duty imposed by section 102 (2) of the Stamp Duties Act, 1920–1949, of New South Wales. A settlor transferred to himself and two others certain funds and property to be held on trust for specified charitable purposes in Australia. Clause 3 of the settlement stated: "The time, manner and the head or heads under which the application and appropriation of the said trust fund and the said income shall be made, and all other details and particulars as to such application and appropriation shall be in the absolute discretion of the trustees, but during the lifetime of the settlor subject to his discretion and approval, and the settlor places on record his belief that it will be found advisable to have completely distributed the trust fund and wound up the trust within 10 or 15 years." By clause 24: "The trustees may also apply and appropriate any property belonging to the trust in its then present condition for any trust purposes and may also use any of the moneys of the trust either *corpus* or income or both in purchasing any land or land and buildings or in erecting buildings or in altering or in improving buildings to be used or applied for any such purpose. The trustees may whether during the lifetime of the settlor or afterwards and shall during the lifetime of the settlor if he so directs apply and appropriate any property including moneys belonging to the trust for the purposes of acquiring by purchase or exchange from the settlor or his executors any real or personal property valued for the purposes of such purchase or exchange at a sum at least 5 per cent. below the valuation of such real or personal property so acquired as ascertained by some independent valuator appointed by the trustees other than the settlor."

The settlor died on August 2, 1945, and the respondents were the executors of his will. The question of law submitted for the

opinion of the Supreme Court of New South Wales by the Commissioner of Stamp Duties was: Should the property which was at the date of the death of the testator subject to the trusts of the said settlement be deemed to be included in his estate for the purposes of the assessment and payment of death duty thereon? The Supreme Court of New South Wales answered the question in the affirmative, but the High Court of Australia reversed their decision, and the Commissioner appealed.

The Board stated that the trust was not in any true sense a trust for different groups of beneficiaries. It was from beginning to end a trust for charity or specified charitable purposes, and those persons who might from time to time receive payments or other benefits out of the trust funds were less beneficiaries than objects of the charitable purpose. That circumstance alone distinguished the case from *Burrell and Kinnaird* v. *Att.-Gen.* ([1937] A.C. 286). There was in the present case no separate trust for any new group of owners which took effect after the settlor's death. The settlement created one trust and one trust only, a trust for charitable purposes, which took effect immediately the settlement was created and continued as one despite the fact that during its continuance different persons might have the right or duty of deciding in what manner the trust funds were to be applied. Clause 3 did not bring into existence a new trust on the settlor's death, to be operated by the surviving trustees, and accordingly death duty was not payable on the settlor's death on the trust property under section 102 (2) (*a*) of the Stamp Duties Act, 1920–49, of New South Wales, which provided that the duty was payable on " all property which the deceased has disposed of . . . by a settlement containing any trust in respect of that property to take effect after his death." [Under this head of the case *Rabett* v. *Commissioner of Stamp Duties* ([1929] A.C. 444) was explained.]

The Board further said that clause 24 of the trust deed was not in itself a complete piece of machinery. But the mere fact that it was formally incomplete was no reason for reading into it more than the provisions of the clause actually contained. Its main purport, at least, was reasonably clear—namely, to afford authority for the use or application of trust funds for certain purposes or in certain ways that would not otherwise be permissible. The second half of the clause was designed to authorise

the use of trust funds for the purpose of acquiring property from the settlor who was, in the inception, and was no doubt likely to remain, one of the trustees. But for the power of direction given to the settlor the nature of the clause would be quite plain. But there had been grafted on the authority thus given to the trustees a right for the settlor during his lifetime to require that trust funds were to be applied to the purpose of such an acquisition. The Board held that the provision in clause 24 empowering the settlor to require that the trust funds should be applied for the purpose of acquiring property from him was a fiduciary power, to be exercised only for the benefit of the settlement, and was not such as to reserve to him an interest in the settled property or a right to retain or a right to reclaim or restore it to himself. That power of discretion, the Board stated, was not the kind of benefit or interest with which section 102 (*c*) and (*d*) of the Stamp Duties Act was concerned, and death duty was not therefore payable thereunder on the trust property. The appeal was accordingly dismissed.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, b.a., ll.b., Advocate

With the number for November, 1951, the *Journal of Comparative Legislation and International Law* comes to an end. In its place the Society of Comparative Legislation are now issuing a new periodical, the *International and Comparative Law Quarterly*, which absorbs the *International Law Quarterly*, whose brief career is thus also at an end. It is a pity that the high costs of publication have led to this result, but there are some advantages in the combination of two separate periodicals that to some extent covered the same ground. The first number of the new journal, for January, 1952, makes its appearance with a foreword by Lord Justice Denning, chairman of the Executive Committee of the Society. There were two aims, he says, in the fields of international and comparative law, and the conflict of laws, to which the new *Quarterly* will hold fast: "first, to handle current questions so as to be of service to all those who have to deal with these fields of law, whether as government servants, as businessmen, or as practitioners or students of law; and secondly, to move freely over the boundaries which seem to divide these fields of law and to bring out the underlying unities." It will "seek especially to be a focus for Commonwealth legal studies," to which the former *Journal* devoted much space and which perhaps constituted its most valuable feature.

THE ENTRENCHED CLAUSES OF THE SOUTH AFRICA ACT

Among the notes on constitutional developments in the Commonwealth in the last number is one that gives a clear view of the background to the recent decision of the South African Supreme Court, invalidating the Separate Representation of Voters Act, 1951 (which removed the Cape Coloured voters from the common roll), on the ground that the Act had not been passed in accordance with the procedure laid down in the "entrenched sections" of the South Africa Act. Section 152 of that Act reads: "Parliament may by law repeal or alter any of the provisions of this Act . . . Provided . . . that no repeal or alteration of the provisions contained in this section, or . . . sections 35 and 137, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together and . . . be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed shall be taken to have been duly passed by both Houses of Parliament." Section 35, one of the entrenched sections, lays down that no law may disqualify anyone in the Cape from being registered as a voter by reason of race or colour alone, unless the procedure set out in section 152 is followed.

The entrenched clauses were undoubtedly binding upon the South African Parliament before 1931. The question is whether they are still binding, or whether they have ceased to be legally effective by

reason of the passing of the Statute of Westminster, particularly section 2, which provides that no law made by the Parliament of a Dominion shall be void on the ground of repugnancy to any British statute and that the Parliament of a Dominion shall have power to repeal or amend any Act of the United Kingdom Parliament in so far as the same is part of the law of the Dominion. At the time when the draft Statute of Westminster was debated by the Union Parliament, the matter of its bearing on the entrenched clauses of the South Africa Act was raised and both Houses passed a resolution approving the draft "on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act." No legal safeguards, however, were asked for or given, as they were in the cases of Canada, Australia and New Zealand.

The question came before the courts of South Africa in *Ndlwana* v. *Hofmeyr* (1937), which was concerned with the legality of the removal of native, as opposed to coloured, voters onto a separate roll. The judgment in that case supported the opinion of those who held that the Union Parliament was no longer bound to observe the terms of section 152, an opinion which, indeed, was held almost unanimously by constitutional lawyers inside and outside South Africa until the recent decision of the Supreme Court. A contrary view was, however, expressed by Professor Cowen, of the University of Cape Town, in a book published last year which attracted much attention. While admitting that the Union Parliament has now sovereign legislative powers, Professor Cowen asserts that the efficacy of the entrenched clauses did not rest, prior to 1931, on the principle of repugnancy, but rested, and still rests, on the ground that section 152 sets out the conditions necessary for the expression of Parliament's will. "The doctrine of Parliamentary Sovereignty merely emphasises the unlimited scope of what Parliament may do by legislation; it does not bear upon what must be done by the constituent elements of Parliament in order to legislate." As for section 2 of the Statute of Westminster, the history of the Statute shows, he argues, that it was not intended to enable the Union Parliament to repeal the entrenched sections without regard to the safeguards contained in the South Africa Act. Alternatively, he argues that the South Africa Act creates fundamental law, being the expression of a compact between the four self-governing colonies to unite. It is only, therefore, in form a British Act. In substance it is a constitution imposed by the South African people on themselves.

The majority opinion has now been cast down by the Supreme Court, and that of Professor Cowen exalted, although it does not appear, from the reports of the case so far available in this country, that the Court has come to its decision by quite the same route. Cowen's main argument is one that leads to some striking conclusions. For what applies to the Sovereign Parliament of South Africa must also presumably apply to the Parliament at Westminster. If Parliament enacted that the House of Lords should not be abolished unless after a majority of the electors had expressly agreed to its abolition, and that no Act repealing this provision should be passed unless a similar procedure were followed, then, according to Cowen's contention, British courts would be entitled, and bound, to hold that a repealing Act, not preceded by a referendum, was *ultra vires* and

invalid. If that is correct, we had better put *Dicey* into the waste-paper basket.

It is true that Sir Ivor Jennings, to whom the example just given is due, seems to think it open to doubt whether Parliament may not pass legislation limiting in such a way its own authority and the authority of subsequent Parliaments. But it is difficult to accept his reasoning on this subject or to understand why he asserts that the only way the argument can possibly be rebutted is by saying that a statutory provision limiting the authority of Parliament is contrary to law (*The Law and the Constitution* (3rd ed.), p. 145). To speak of an Act of Parliament as contrary to law, or void, is to say something that is simply meaningless to a British court. One might as well say that an Act of Parliament was green.

Both Cowen and Jennings start from the same position, namely that "the law is that Parliament may make any law in the manner and form provided by the law" (Jennings, *op. cit.*, p. 144), and consequently that any law which Parliament purports to make that is not in the manner and form provided by the law is bad. The difference between them is that Jennings thinks (with some hesitation) that there is another rule of law which prohibits Parliament from passing legislation to limit its own authority, whereas Cowen apparently denies this. But is the postulate sound, or is Jennings not right when he says earlier in the same book (p. 56) that "the law is that the law may at any moment be changed" by the legislature? It is plain that the two statements are totally irreconcilable. No one can be said to be bound by a rule which he himself is free to alter in any way and at any time he chooses. If the latter statement is true of Parliament, then what is there to prevent Parliament from passing laws which are not in the manner and form provided by the law? There may be a political or a moral restraint, or a restraint of some other kind. There cannot be a legal one, not at least that a British court of law would recognise. Since the law is what Parliament says it is at any particular time, it is the will of Parliament that prevails over the law, not the other way about, and the manner in which Parliament expresses its will is irrelevant. No doubt it is necessary that the courts shall be satisfied what the will of Parliament is, a matter which might be far from easy if it were not the custom for Parliament to express its will in the form of an Act of Parliament. But there is no other reason for the solemnity, which is a requirement of practical convenience, not of law. Provided the constituent parts of Parliament are agreed, they may change the form as they please, and did so when they passed the Parliament Act of 1911.

There is no need to conjure up some mysterious rule of law, like Sir Ivor Jennings, to explain why Parliament cannot limit its own authority. Nor is it satisfying to argue, like Dicey, that this follows from the nature of the sovereignty which Parliament possesses, since other legislatures which, according to Dicey, are non-sovereign are under the same disability. The real reason is simple and has nothing to do with sovereignty. It is that a legislature which could not rescind its own decisions would be incapable of performing its functions, and in particular that the party system could not operate if the

party in power were able to determine future policies, so that they could not be reversed when the opposition party came into office. Indeed, in a country like this one where no distinction is made between fundamental and ordinary laws the results could be preposterous, for a snap decision taken by a Parliamentary majority could never be overturned except by a revolution. Elsewhere the procedure of constitutional amendment could be used to remedy to some extent the difficulty.

The remainder of Professor Cowen's thesis is less paradoxical. It seems doubtful whether it can properly be said that the history of the Statute of Westminster shows that it was not the intention to allow the Union Parliament to disregard the procedure laid down in the entrenched clauses of the South Africa Act. On the contrary, does the fact that the Statute of Westminster deliberately omits any reference to the entrenched clauses not go to prove that the intention was that in future they should be only morally, if at all, and not legally, binding? Or alternatively, and at the lowest, that the question of their obligatory force should be left entirely to South Africans to decide in such manner as might seem best to them?

Cowen's last argument is perhaps the strongest, if not altogether convincing. No doubt the South Africa Act was in substance largely a constitution bestowed by the South African people on themselves. The notion of fundamental law is foreign to British constitutional theory. It can, of course, be imported, as it has been in the federal constitutions of Canada and Australia. But there would seem to be a necessity for a precise distinction to be made between laws which are fundamental and laws which are not, and for special procedure to be provided for maintaining the distinction. If the prohibition against repeal or alteration of the entrenched clauses in section 152 applied to the whole South Africa Act, it might be said with very great force that the Act created fundamental law, which Parliament could alter only in the manner provided by the Act. Since the prohibition is not general, it is hard to see how the other clauses of the South Africa Act can be maintained to be fundamental, that is to say distinguishable from ordinary law. On the other hand, to contend that the entrenched sections constitute fundamental law and the rest of the Act ordinary law is a rather strange proposition. There would be nothing to prevent the Union Parliament, while refraining from legislation in direct conflict with the proviso to section 152, from nullifying it indirectly by, for example, abolishing one of the Houses of Parliament altogether.

THE SCHUMAN PLAN

The first number of the new *Quarterly*, in addition to several articles, contains notes on topical questions of international organisation and comparative law, summaries of relevant legislation and of judicial decisions, book reviews, a list of official documents, and other matter. A Dutch contributor discusses the European Coal and Steel Community, otherwise the Schuman Plan, which is as much of a novelty juridically as it is economically and politically. It is unfortunate, since the scheme is difficult enough

anyway to understand, that the writer has not a better command of English. The treaty constituting the Community was initialled a year ago and it may be expected to come into operation shortly, when it has been ratified by the remainder of the six governments concerned, those of France, Germany, Italy, Holland, Belgium and Luxembourg. There are three essential features of the Plan to which its presiding genius, M. Monnet, has called attention, namely (a) the supernational character of the Community; (b) the creation of a single market of 150 million consumers of coal and steel; and (c) the elimination of restrictive cartel practices and excessive concentrations of economic power.

The treaty is to run for 50 years, the first five years being a transitional period during which certain protective measures may be maintained by the coal and steel industries of the member States, in particular the Belgian coal industry and the Italian steel industry, against competition from the other member countries. At the end of this period there will be in effect a customs union of the six countries in coal and steel, with a uniform customs tariff and a common commercial policy towards non-member States. But much more is involved in the Plan, for there are extensive provisions for preventing discrimination in favour of national industries, for dealing with shortages and surplus production, for regulating cartels and mergers, for co-ordinating development, etc.

Elaborate machinery is set up to carry out the provisions of the treaty. The body chiefly responsible is the High Authority, which will consist of nine members, eight nominated by agreement between the six governments and one selected by the other eight, to serve for terms of six years. Once elected, the members of the High Authority are to be completely independent of the governments and to devote their whole time to the business of the Community. In addition, there is a Council of Ministers, consisting of one representative of each of the six participating governments; an Assembly of representatives of the peoples of the six countries, chosen either by direct suffrage or by the parliaments, Germany, France and Italy having 18 representatives each and the smaller countries 24 between them; a Consultative Committee; and a court, composed of seven judges, also appointed by agreement between the governments and serving for terms of six years.

The fate of the Plan will, it is fairly plain, depend mainly on the relations between the High Authority and the Council of Ministers, whose task is expressed to be that of "harmonising the action of the High Authority and that of the governments, which are responsible for the general economic policy of their countries." If the governments are anxious for the success of the Plan and support the High Authority adequately, then its objects may be attained. If not, the High Authority will probably find itself in constant conflict with the Council. This is a possibility that the authors of the Plan have been careful to guard against, so far as could be done, and a complicated system of checks and balances has been drawn up to prevent the work of the High Authority being obstructed, while giving the member States through the Council the final word in many, or most, important issues. Thus there are some measures which the High Authority may take

without the concurrence of the Council, others for which the unanimous consent of the Council is necessary, and others again for which the consent of a majority of the Council is sufficient. The voting on the Council may be weighted or unweighted. In the latter case a decision is taken by a two-thirds majority, so that any three members acting together may block it. In the former case the majority must include either France or Germany, the two principal producing countries, so that if they agree they can prevent a decision being taken. Where, of course, the unanimous consent of the Council is required, any one government has a right of veto on decisions. The powers of the Council are not, however, wholly negative. In some cases, acting unanimously, it can compel the High Authority to apply certain measures, or can itself take action, thus displacing the High Authority as the governing body of the Community.

The Assembly seems designed to play a rather minor part in the Plan. It meets yearly and discusses a general report submitted to it by the High Authority. It may force the resignation of the High Authority *en bloc* by a vote of censure passed with a two-thirds majority.

The Consultative Committee is composed of an equal number of representatives of workers, producers and consumers, and must be consulted by the High Authority in certain cases, although its advice need not be followed.

Finally, the court has jurisdiction in disputes arising out of the treaty. Member States, the Council, or firms can appeal to it on the ground that a decision of the High Authority is contrary to the provisions of the treaty, or where the High Authority has failed to take action in accordance with the duties laid upon it by the treaty. Member States or the High Authority may also appeal against decisions of the Council or the Assembly. The court decides disputes between member States with regard to the application of the treaty. Decisions of the court are to be final even between nationals of the same country, and are to have the force of law within the territories of the member States.

It will be seen that the Community is a hybrid organisation, partly supernational and partly international in character, the High Authority representing in the main the former element and the Council the latter. The difference, and it is fundamental, between a supernational and an international institution is that the one is not and the other is an association of governments. Where decisions are the responsibility of a body of the nature of the Council, it is the individual governments who really decide, their representatives on the Council being merely diplomatic envoys, strictly bound by the instructions given to them. In the last resort, therefore, national considerations will always predominate, and it is only so long as they do not forbid it that any useful results can be achieved. No essential difference is made by the fact that some decisions may be taken by a majority vote in the Council, since this merely means that individual governments agree in advance, in certain carefully defined and usually minor respects, to waive the right to veto measures desired by the majority of governments. Voting, in any event, is almost sure to be determined by extraneous political motives more than by the merits of the case.

There is no possibility of the Council having a will of its own. The will is that of the separate units comprising it.

The High Authority, on the other hand, is a body of a quite different nature. The members must neither solicit nor accept instructions from any government or outside body, and must "abstain from all conduct incompatible with the supernational character of their function." They may be expected to develop an *esprit de corps* and to resist any attempt by the governments to put national or sectional considerations before the interests of the Community itself. On paper the High Authority has important powers. But the extent to which they will be exercised in practice depends on the backing which it receives. For this reason the greatest weakness of the Plan appears to be in the subordinate part which is assigned to the Assembly. The High Authority consists of nine individuals whose influence compared to that of the Council is bound to be small, for no supernational body which does not draw its power from the electorates of the countries concerned can hope to compete with democratically elected national parliaments. If there were an Assembly with real powers derived from the peoples it might constitute a reinforcement of the High Authority strong enough to offset the influence of the Council. As it is, the Assembly, like the Assembly of the Council of Europe, will only be able to debate and will find itself incapable of effectively supporting the High Authority in the task of overriding national prejudices and thwarting national intrigues. It is destitute even of financial resources or powers. The High Authority may procure funds by imposing a levy up to one per cent. on the value of coal and steel produced or by borrowing. In order to levy more than one per cent. it must secure the consent, not of the Assembly, but of the Council voting with a two-thirds majority. We may wonder why the Assembly should exist at all except for ornamental purposes. There is scarcely much likelihood that its power of forcing the resignation of the High Authority as a body will be often exercised. It is far more probable that it will be found in opposition to the Council than to the High Authority. But so far as the Council is concerned it is more or less impotent.

Periodicals also received : *The Law Journal*, *Canadian Bar Review*, *The Medico-Legal Journal*, *The Modern Law Review*, *Connecticut Bar Journal*, *La Justicia*, *The Law Quarterly Review*, *Revue Internationale de Droit Comparé*, *New York University Law Review*, *The Western Political Quarterly*, *The Malayan Law Journal*, *Oklahoma Law Review*.

RECENT LITERATURE

Law and the Laws. By Nathaniel Micklem, Principal of Mansfield College, Oxford. 1952. Edinburgh: W. Green & Son, Ltd. Price 15s. net.

This essay by the Principal of Mansfield College is a sign of the times. All over free Europe a debate is going on concerning the nature of law and its relation to ethics on the one hand and theology on the other. The debate arises because Nazi occupation and Communist tyranny have compelled practising lawyers and judges to face and settle certain ultimate issues which for long have been ignored in Europe and are still largely ignored in this country. The decrees of the Third Reich, which complied with legal and constitutional formalities, resulted in the deliberate murder of twelve million people. If the philosophy of legal positivism is accepted, it has to be conceded that these results represent the rule of law. It is not surprising therefore that European lawyers should be driven to examine the basis of a philosophy of law which is impotent to resist or condemn such a monstrous perversion of all that law has come to signify in two millenniums. British lawyers would do well to take an interest in the debate, remembering what the sovereignty of Parliament can be stretched to mean. We can throw no stones at our Continental brethren while *Liversidge* v. *Anderson* remains on the books to remind us that legal positivism, operating as the implicit philosophy of a whole generation of lawyers, affords but slender protection against the encroachment of the executive.

The appearance of this book, like the recent Reith Lectures given by Lord Radcliffe, is a proof of reviving interest in the great questions of law and politics. It is in fact a courageous and convincing restatement of the doctrine of natural law. This doctrine is traced from its source in classical times, especially in Cicero, to its medieval formulation in Aquinas and its post-reformation development in Suarez. Consideration is given to the competing theories of Austin, Kelsen, Duguit, and Savigny, and the American School of sociological jurisprudence represented by Pound and Stone. Dr. Micklem regards the crucial issue for jurisprudence as the theologian sees it in the tension between the doctrine of Natural Law and the Historical School of which Savigny is the greatest figure. While fully conceding the difficulties in the way of any modern restatement of Natural Law and rejecting the possibility of setting up a perennial system of casuistry he argues in effect for a natural law of variable content. The perfect system can never be achieved because even the purest constructions of human reason are tainted with pride and self-interest and due regard must be given to changing circumstances of time and place if in Burke's words "the medicine of today is not to become the poison of tomorrow." Such a position is far removed from moral relativism. It takes account of historical development without forgetting that if law is not related in some manner to justice it becomes merely what is said

by the man at the right end of the tommy-gun. That it is much more than this is evidenced by the history of all dictators summed up in the saying of Rousseau that "the strongest is never strong enough to be always the master until he has transformed strength into right and obedience into duty." It is the thesis of Dr. Micklem's book that if the requirements of religion be overlooked and men cease to walk humbly with their God the requirements of the law will soon cease to be met, and the law itself will inevitably change its requirements and turn into its own negation.

There is ample contemporary evidence in support of this contention. Whatever be the difficulty of formulating a modern doctrine of natural law in a satisfactory way the fact remains, as Acton pointed out, that there is no alternative to some such doctrine except raison d'état. There is no safeguard for the individual against the overwhelming power of the State except in a doctrine of the nature of man which maintains the absolute value of human persons. This doctrine stems from the Christian faith, apart from which it does not survive.

One could have wished that Dr. Micklem had left Austin out of the reckoning and gone direct to his master, Hobbes. Austinian jurisprudence is simply the legal aspect of the Leviathan, *i.e.*, the totalitarian State. One could have wished also that the chapters on Suarez, interesting though they are, had been given to the first book of *Hooker's Ecclesiastical Polity*, which contains the best statement of Natural Law in the English language. Scots lawyers will note that there is no reference to Stair, who has much to say on this great theme. The first title of his Institutions sets forth the classical theory of Natural Law with the modifications which make it tenable even today for a practising lawyer. But these are minor criticisms. This is a notable book. It is good gear in small bulk. It should be widely read and not by lawyers only.

T. M. Taylor.

Select Cases in the Law of Scotland. Second Edition. By Andrew Dewar Gibb, K.C. 1951. Edinburgh: W. Green & Son Ltd. Price 25s. net.

That sadly neglected body of men (and some women), students of Scots Law, ought to render humble thanks to Professor Gibb for this timely second edition of his *Select Scots Cases*. A student of Scots Law could receive no better advice than this, at all costs to procure a copy of this book and to keep it in his pocket (for it is of no great bulk) till he wins free of the tyranny of examinations. In it he will find much judicial wisdom, and not a little judicial blindness, both alike the subject of illuminating comment by the author in the useful notes appended to each case.

Commencing with "Agency," Professor Gibb has exhausted the legal alphabet with "Statute Law," and, with great success, within the 194 pages to which this work extends, he has compressed excerpts from those cases which, in his opinion, reveal much that is invaluable to him who seeks knowledge of Scots Law. Choice of cases is a matter of personal predilection, and the relevant adage is that you can never please everyone, yet few who have at heart the teaching of Scots Law could honestly dissent from nine-tenths of the cases selected

by Professor Gibb. There is, of course, the debatable one-tenth, but that is inevitable.

First of all, however, this work raises sharply the question—What is the purpose of a case-book? The answer favoured by this reviewer is—To put before the reader in convenient form a case in which a principle of law has been applied to the specific facts then before the court so as to show how the particular decision has been reached. As Lord Gifford said in *Moffat* v. *Park* (5 R. 13 at 17) "I am anxious to preserve entire the matter of principle, which is far more important than the particular case before us—the rule of law applicable to such cases." Is not the case-book the photographic "still" of rules of law in action? If this view be correct, then, with all respect to the learned author, the headnote attached to *Bourhill* v. *Young* (1942 S.C. (H.L.) 78) is not wholly satisfactory. The note reads "A careless driver has, *semble*, no duty not to cause mental shock to a person not within his view, by colliding with another road-user." Could it be said that this proposition embodies a principle of Scots Law, a rule of law? Similar criticism may be made of the headnote to *Steel v. Glasgow Iron and Steel Company* (1944 S.C. 237) which reads: "A man is entitled without negligence to intervene in a dangerous emergency caused by another's negligence in order to save life, limb, or property, provided that his intervention is not unduly dangerous or beyond the exigencies of the situation." Does the importance of these cases not lie in what they have to say on the vexed subject of proximity of relationship between pursuer and defender?

There remains the debatable one-tenth. It is always far too easy for a reviewer to say how he would have written the book: this practice finds no place here: yet standing the decision of a court of seven judges in *M'Elroy* v. *M'Allister* (1949 S.C. 110) it is difficult to understand the inclusion of *Evans & Son* v. *Stein & Co.* ((1904) 7 F. 65) and Professor Gibb's note thereto. That part devoted to Criminal Law might have benefited from a case or two on "self defence" and "provocation."

One last word seems necessary. It is sad to reflect that some 18 years have passed between the appearance of the first edition of this work and the second, and that nothing in the shape of more specialised case-books has appeared among the literature of Scots Law. Professor Gibb's original preface still stands. It would be interesting to hear him digress on this sentence from the preface: "The case-book is less well known in Scotland than in England, where the student has, and in the nature of things must have, a far greater wealth of students' books at his disposal."

J. J. Gow.

The Parliament House Book, 1951–52. 1951. Edinburgh: W. Green & Son, Ltd. Price £3 net.

An appreciation of such a familiar work as the *Parliament House Book* might well be thought unnecessary and superfluous. This year's edition of the *Parliament House Book*, however, is in many respects a new work. It is described by the Editor in his Preface as a "Revised Edition." This is an understatement, for the printing, arrangement

of material and whole presentation are vastly improved. To outward appearances the *Parliament House Book* is the same as ever, the size (alas !) and the binding remaining unchanged, but the subscriber who has not yet inquired within will be pleasantly surprised when he does so.

The *Parliament House Book* has long been a valuable and comprehensive work of reference—it is now in its 127th year—but one must admit that it has had one or two defects which caused the practitioner to refer to other sources where possible for material which, although contained in the *Parliament House Book*, was not there available in a convenient or attractive form. The size of the print and the use of Roman numerals undoubtedly detracted from the value of former editions. These defects have now been remedied. The enlarged print is easy to read and the use of Arabic numerals enables the less erudite, such as your reviewer, to discover at a glance the section of a statute for which he is looking.

For other improvements in addition to those already mentioned the practitioner will also be grateful. All repealed legislation has been cut out and amendments to statutes have been incorporated in the text of the Acts to which they relate. Swift reference is also facilitated by the rearrangement of the divisions of the book. Acts of Sederunt, which were previously printed together in a separate division, now appear in the divisions to which they relate and Tables of Fees, previously to be found in various divisions, are now brought together in the Fees, Stamps and Death Duties Division. The new Table of Fees for Conveyancing and General Business is not included because, as explained in the Preface, it was not available in time for publication, but it will appear in future editions.

The legal profession will be grateful to the publishers for their enterprise in producing a *Parliament House Book* which is even more valuable than its predecessors.

D. W. R. Brand.

Supra Crepidam. Presidential Addresses delivered to the Scottish History Society by The Rt. Hon. Lord Cooper. 1951. Edinburgh : Thomas Nelson & Sons Ltd. Price 7s. 6d. net.

This is a small book of refreshing versatility and vitality in the tradition of Kames—though of much greater reliability. The Lord Justice-General does not regard the attainment of the apex of his profession in Scotland as debarring him as an amateur from other fields of research. A forensic training, after all, may require a man to become master of such widely divergent subjects as marine navigation, portrait painting, and toxicology. Lord Cooper's Presidential Addresses to the Scottish History Society fully justify the author's submission that it is sometimes useful to apply the technique of one subject to the elucidation of another totally different subject. Thus in his four papers he applies in turn the techniques of law, cartography, astronomy and literary criticism to assist in clarifying the problems of the historians.

Though in his fourth paper Lord Cooper is not concerned with the constitutional implications of the Declaration of Arbroath, the

added light which he sheds on the Declaration should be welcomed by legal historians and jurists who are concerned with contractual views of sovereignty in medieval theory and in Scottish constitutional law. In a short review for a legal journal, however, a reviewer should probably "stick to his last," and confine his comments in the main to Lord Cooper's first paper, "The Scottish Lawyer's Outlook on Scottish History." It is fairly certain, nevertheless, that he who peruses the first essay will read to the end of the book and find his mind greatly stimulated thereby. For the first paper, Lord Cooper chose his text from *Holdsworth's History of English Law*, "History can humanise law and law can correct history; together they accomplish much that neither can accomplish alone." He illustrates his point by references to pre-Union Scottish Statute Law. The Scottish lawyer who is given to reflection must often have asked himself, as Lord Cooper asked the historians, what the explanation was for those periodic outbursts of statutory reform in private law which must have had, not only an immediate effect upon the social and economic life of the people, but also a permanent effect upon the Scottish legal system. Lord Cooper gives among his illustrations the fifteenth century legislation aimed to benefit the "puir tennentes" or "the puir people that labouris the grund." In this legislation one finds the basis of the Scottish law of leases, the provision of greater security of title for landowners and of tenants, and the freeing of land from feudal restriction upon alienation *inter vivos*. These measures are still of living importance, and one may cite in evidence thereof such cases as *Millar* v. *McRobbie*, 1949 S.C. 1, and *Lord Advocate* v. *Marquess of Zetland*, 1920 S.C. (H.L.) 1—wherein Birkenhead L.C. gave an exposition of Scottish medieval conveyancing which gained the admiration even of the masters of that intricate subject. "But" Lord Cooper asks, "why this legislation?" What pressure extorted these concessions from the rich and powerful few in favour of a politically impotent section of the community? There is no record of a Tiberius Gracchus or Langland in fifteenth century Scotland, nor were the governing classes reputed for their enlightened self-interest. What part had public opinion, and what part the fear of a Jacquerie? Lord Cooper leaves it to the historians to answer these questions, pointing out that it is often in the periods which the historians find dull and uneventful that fundamental legal reforms are encountered.

The Lord Justice-General deals also with that remarkable body of seventeenth century legislation which introduces the positive prescription, public registration of deeds, and other measures to suppress fraudulent dealings in land. About the same time, legislation, which still operates, was passed to frustrate fraudulent debtors. An astonishing amount of fraud and chicanery seems to have prevailed in Scotland during the sixteenth and seventeenth centuries, and Lord Cooper would clearly have liked to examine John Knox as to the reasons therefor.

Lord Cooper points out that, in contrast to English and American law where the ancient law is common law, the bulk of pre-Stair Scots Law is statute law. A large number of these statutes are still in operation, and have withstood the test of time with astonishing success. It may be regretted that those responsible for the Third Edition of Statutes Revised did not have access to Lord Cooper's paper before

producing the 1951 revision. In that revision they have dealt with all English statutes from 1235 onwards, but have entirely neglected pre-Union Scottish legislation. Lord Cooper's book may thus serve a useful purpose, not only to the legal historian, but to the practical legislator. The educated Scotsman, be he lawyer, historian, or of any other calling, will find the Lord Justice-General's four papers well worth perusal for themselves, and also to encourage the robust confidence of the enthusiastic amateur to intervene in other people's affairs.

T. B. Smith.

A Prospect of Gray's Inn. By Francis Cowper. 1951. London: Stevens & Sons, Ltd. Price 30s. net.

It is from the corporate life of one of the Inns of Court that the barrister in London draws that sense of comradeship, loyalty and of professional "separateness" which members of the Scottish and Irish Bars find in the life of the Parliament House or of the Four Courts. Mr. Cowper's historical prospect of Gray's Inn is written, not only with scholarship, wit and taste, but clearly also with a deep love of Gray's Inn and of all those traditions of "Domus" which he has done so much to keep alive. Gray's Inn alone of the four Inns of Court has long ceased to be used by barristers for professional chambers. The practising barrister has his chambers in Lincoln's Inn or in the Temple, which are closer to the Law Courts; while solicitors, architects, and others conduct their professions in the chambers in Gray's Inn which were formerly occupied by the Bar. Possibly because of this circumstance Gray's Inn men have put a particular value upon the social life of Common Room and Hall, where the corporate professional brotherhood is sustained. Likewise the refreshing of mind and spirit found in the peace of the Walks and of the Chapel has meant much to generations of members. It was thus a heavy blow indeed when, in May, 1941, the Hall, Chapel and Library were, so it seemed, irreparably destroyed by enemy air bombardment. Few could then have thought that the atmosphere and the traditional decoration and setting could ever be replaced within the smoking shell which was left standing. Vision and determination, with faith in the future and love of the past, have, however, prevailed; and on December 5, 1951, H.R.H. the Duke of Gloucester, himself an Honorary Bencher of Gray's Inn, reopened the Hall. Mr. Cowper's book is thus published at a most appropriate time.

The author quotes Maitland: "No English institutions are more distinctively English than the Inns of Court," and the story of Gray's Inn which Mr. Cowper unfolds fully justifies this assertion. It is a social history of a professional brotherhood housed in a unique setting, but it is also part of the social history of English life, since the legal community which the author describes took an astonishingly prominent part in public life. Tudor and Stuart England gave particular scope for the lawyer.

The learned author gives a clear and fascinating account of legal education and training in the Inn prior to the Civil War. The mutual obligation of members to teach and learn in their various places in the

hierarchy of membership of the Inns of Court is very different from the tradition of legal education in systems which founded themselves on the Civil Law. As late as 1750 for an advocate in Scotland to be admitted on his knowledge of Scots Law was a less honourable entry than upon a knowledge of the Laws of Rome. The Inns of Court, however, were essentially concerned with English law, and had little time or admiration for any other system. The newly admitted student became first an "inner barrister," and after seven years might qualify as an "utter" or "outer barrister." In time he would become an Ancient, and, after discharging the office of Reader, might be elevated to the status of Bencher. As Reader, a barrister assumed responsibility for the legal education, not only of the students, but of the whole community which joined in the "exercisings." It became his duty to deliver readings at which his propositions would be open to general challenge; and, assisted by two Benchers, the Reader had to preside at the moots or mock actions whereat the younger members of the Inn gained experience and eventually demonstrated their fitness for practice. The Reader had also to provide considerable general entertainment, and accordingly incurred considerable expense. If a member of the Inn took the coif of Serjeant (*serviens ad legem*) with the consequent exclusive privilege of appearing before the Court of Common Pleas and qualifying for selection as judge, his connection with the Inn was severed. With feasting and with solemnity he took his leave of the community, and when he left for Serjeants' Inn the bell tolled at his passing.

The life of the Inn has never been confined merely to the pursuit of law: there still survives a strong tradition of hospitality and appreciation of gracious living. The great days, however, of high festival in Elizabethan and Stuart times will probably never be excelled. The masques staged by members of the Inn were on an heroic scale. The entertainment staged for Queen Elizabeth was a token of the affection and admiration in which she was held by members of the Inn, and her memory is toasted to this day. Whereas James VI and I also appreciated the loyal entertainment of members of Gray's Inn, he was less pleased with the high spirits of those who, having taken cannon from the Tower of London, discharged a *feu de joie* that brought the King from his bed with cries of "Treason!"

The full communion of learning and social life did not survive the Civil War, and, though the festivities and communal life remained, the old system of legal education fell into decay. The eighteenth century was one of tranquillity rather than of vitality, and in the nineteenth century there was both change and decay. So far as legal education was concerned, until 1865 there was no examination qualification imposed, though to be called to the Bar a man had to eat his dinners and keep his terms. There was no guarantee that on admission he would be qualified by experience and approbation of his fellows to sustain the responsibilities of his profession. In the course of the century Serjeants' Inn was abolished, and the serjeants returned to the Inns whence they had come. The composition of the Inns altered to include many whose first loyalty was not to England, and it was one of the criticisms of Gray's Inn that its members included too many of the Irish. At the end of the century, through the faith of loyal sons

of Gray's Inn in the future of Domus, legal scholarships were founded which made it possible for men of ability who would otherwise have lacked the means to seek admission to the Bar, to embark on the career of their choice. When one reflects on the talent which has been encouraged by scholarships such as the Arden, Holker, Lee and Bacon and Holt, one is inclined to regret that no equivalent provision has been made at the Scottish Bar to sustain the newly admitted advocate of exceptional ability but of limited means through the first years of his practice.

The twentieth century saw a strong revival in Gray's Inn. Not only did it add to its members men who were to reach the highest reputations in the English legal system, such as Atkin and Birkenhead, but the privilege of membership was also extended to a number of the Scottish Lords of Appeal in Ordinary whose duties required them to live in London. Lord Watson, Lord Shand, Lord Thankerton and now Lord Reid are on the Roll of the Benchers of Gray's Inn.

A community which has included among her sons such men as Gascoigne, intrepid Justiciar of Henry IV, Thomas Cromwell, Bacon, Laud, Whitgift, Juxon, Bradshaw, Sidney, Scroggs, Holt and Birkenhead, has clearly nurtured many of the leading actors on the scene of English history, in law, in politics, in church government, and in letters. The force is not yet spent, and those who enjoy membership of the Inn are drawn now from both sexes, from many walks of life, and from many countries. The strength and spirit of comradeship with the Common lawyers of America is now symbolised by the new window which has been built into the restored Hall, the gift of the American Bar Association. It must be confessed, however, that the traditions and way of life of so essentially English an institution as Gray's Inn have not always succeeded in bringing into the full intimacy of the family circle those who come from beyond the seas to drink at the source of the English Common Law. That is a problem which to some extent has still to be solved. Unlike the Roman Law and some modern codified systems, the English Common Law has spread beyond its original confines by imposition rather than by adoption. Now that political ties have been severed or attenuated between London and many countries to which the Common Law was extended by Imperial legislation, it remains to be seen how the seed planted will grow in different soils and climates, tended by men of different races and temperaments. The spirit of the Common Law is to be found as much in the professional tradition as in the Law Reports and treatises; and it is indeed more important that the spirit be handed on than the mere letter of the law. The transmission of the tradition of the Common Law is one of the most important tasks which the Inns of Court have now to undertake. It is well, therefore, to consider this noble tradition in perspective—as Mr. Cowper in his admirable study enables one to do. The learned author of this book has been successful in his blend of past history with living issues; and he encourages the belief that—not in a history, but only in a prospect—can Gray's Inn fully be understood.

T. B. Smith.

Law and Social Change in Contemporary Britain. By W. Friedmann, LL.D. (Lond.), DR.IUR. (Berlin), LL.M. (Melbourne). With a Foreword by The Rt. Hon. Sir Alfred Denning. 1951. London : Stevens & Sons Ltd. Price 37s. 6d. net.

Professor Friedmann has again written a stimulating and fascinating book. It derives force from the author's wide experience and his encyclopaedic acquaintance with American and Commonwealth legal literature. His theme here is the impact of the social and economic changes of the last half-century and particularly of the last ten years on the law of Britain (for this text applies as much to Scotland as to England) and the result is to emphasise the growing importance of public and administrative law, and the necessity of lawyers and judges paying more attention to social and economic trends. Once more too it draws attention to the crying need to systematise the untidy mass of tribunals and to make adequate provision for appeals. The central problem of administrative law is to balance individual rights and interests with social needs and community claims but no amount of community benefit is likely to placate an individual unless his objections can have a proper outlet before an appellate body. Of particular value are the chapters on contract which show how far we have travelled in fact from the consensus of two minds postulated by the current text books, and on tort which sets out the relation of common law liability in tort to the modern conception of social insurance : similarly the two chapters on statutory interpretation reveal how woefully disparate are the traditional canons of interpretation and the newer construction by regard to the social purpose of the statute. Above all, the merit of this study is that it does not proceed by misty generalisations but by an examination of the statutes and decisions of the last few years, and it shows the danger of stultifying the social revolution of our time by a narrow, too-legal, and backward-looking approach. If the modern law is to suit modern society it must be approached in a modern way and we should be grateful to the author for this lucid analysis of the position. It is probably not too much to say that this book presents a picture of law in Britain today as important as that of late nineteenth-century Liberalism painted by Dicey. It is a book to be read, pondered and applied.

There are some errors which should be corrected in a later edition : the Patents and Designs Act (p. 24) is in fact two separate Acts : on p. 31 " All E.R." should be " 2 All E.R."; on p. 55, n. 2, " Mansfield " should be " Cooper " (as on p. 48); on p. 115 it is not clear that the Trade Union Act of 1927 has been repealed; on pp. 159 and 170 the reference to 66 T.L.R. should be to 66 T.L.R. (Part 2); on p. 160 " Court of Appeal " and not " Court of Appeals "; on p. 171, n. 1 H.W.R. not H.L.R. Wade (it is correct on p. 312); and on p. 202 L.N.W.R. not L.N.E.R.

D. M. WALKER.

Leviathan and Natural Law. By F. Lyman Windolph. 1951. New Jersey : Princeton University Press. (London : Geoffrey Cumberlege). Price 16s. net.

In this short book an American lawyer has set down the conclusions of forty years of reading and thinking about politics. He writes with learning, clarity and vigour on such topics as the distinction between State and government, the various types of States, the nature of sovereignty, liberty, democracy, majority rule and, above all, of the eternal dispute between Hobbes and Aquinas—the disagreement, which may be narrowed but never completely reconciled, between positivism, which emphasises the need of maintaining order, and natural law, which asserts the irrepressible claims of justice. British readers may question some of his references to our institutions. Perhaps his unfamiliarity with them has led him into some misconception or perhaps it is we who do not quite understand his description of them in terms characteristic of the framework of American political thought. It is not altogether easy for us to discover a sovereign in the sense of a supreme holder of *de facto* (not *de jure*) power. But for this very reason, that it looks at familiar and fundamental problems from a slightly unfamiliar point of view, Mr. Windolph's work should be all the more stimulating to the alert and critical British reader.

A. H. Campbell.

Friedrich Karl von Savigny, Juristische Methodenlehre. Edited by Garland Wesenberg. 1951. Stuttgart: K. F. Koehler Verlag. Price DM. 4.80.

In the winter of 1802–03 Savigny, then twenty-three years old, lectured two hours a week on Juristic Methodology. Jakob Grimm, a pupil of his, then seventeen years old, took notes of this course (they are not extant) which he later wrote out; and his brother Wilhelm Grimm made a copy of Jakob's manuscript. Wesenberg has now edited Jakob Grimm's manuscript, occasionally correcting it from Wilhelm's copy, and providing it with a brief but stimulating introduction.

In the nineteenth century several great methodologies appeared in Germany: Boeck's for Classics, Droysen's for History and Schelling's for the Academic Study in general. Savigny's *Juristic Methodology* is on a far more modest scale than these, but it does fill a gap. It is in three parts: (1) The absolute study of the law; this is subdivided into (a) philological study or interpretation, (b) historical study, (c) systematic study. (2) The study of legal literature. (3) The academic study of the law.

The doctrine of the Historical School that law cannot be made but comes naturally into existence through the spirit of the people is not yet to be found in this early work. Still, a remark on Justinian is suggestive: "Justinian never intended to make a code of his own, but only a compilation of the plentiful material; the historical whole itself has again become law."

There is an interesting paragraph on the Law of Nature. It is not

rejected outright. What Savigny in this course maintains is, first, that one may be a good lawyer without knowing about the Law of Nature, secondly, that a Law of Nature which simply repeats the rules of Roman law in a slightly more general form is of little value, thirdly, that a truly philosophical treatment of the law necessitates an inquiry into political principles, and fourthly, that such a treatment should not be undertaken as a side-line by people without either the vocation or the proper training for it.

Quite a few observations are as valid now as they were 150 years ago—for example, those respecting the proper way of reading books, or those about the special value of lectures as opposed to books.

The editor, who has done an admirable piece of work, deserves the gratitude of all those who are interested in jurisprudence and its history.

DAVID DAUBE.

La Simpatia nella Morale e nel Diritto : Aspetti del Pensiero di Adam Smith. By Luigi Bagolini. 1952. Bologna: Dott. Cesare Zuffi, Editore. Price 800 Italian Lire.

Sheriff Kermack, writing in the first volume of the Stair Society's publications (*Sources and Literature of Scots Law*, at p. 441), pointed out that the main Scottish contribution to legal philosophy in the eighteenth century was made not by the lawyers but by the moral philosophers, such as Hume, Hutcheson, Adam Smith, Reid, Ferguson and Dugald Stewart. Dr. Bagolini, now Professor in the University of Genoa, who lived and studied in Edinburgh during the winter of 1947–48, has already written on Hume and now gives further fruits of his researches in an admirably lucid discussion of Adam Smith's theory of "sympathy" as a basis of moral, and therefore of legal, principles. Our eighteenth-century writers did not discriminate sharply between moral and legal philosophy and their debates are far removed from the analytical jurisprudence of the nineteenth century, but they are perhaps not irrelevant to the jurisprudence of today, which at many points, for instance, in its search for a doctrine of "human rights," has been compelled to re-examine the moral foundations of the legal order. In any event their writings constitute an important chapter in the history of thought, and it is interesting and gratifying to know that a distinguished Italian scholar has chosen to work in this field.

A. H. CAMPBELL.

A French-English—English-French Dictionary of Legal Words and Phrases. By A. W. Dalrymple, M.A., Advocate. Second Edition. 1951. London: Stevens & Sons, Ltd. Price 21s. net. (The English-French and French-English Dictionaries are available separately, price 12s. 6d. net each.)

The first edition of this work has long been out of print. The second is greatly enlarged, yet even so manages to be astonishingly

concise and handy. The two parts of the dictionary are also available separately.

Where such brevity has been achieved, one cannot expect completeness. He who needs a translation, say, of " contributory negligence " would look for it in vain. The word *pratique* is not included, though *pratique des tribunaux* is a not infrequent synonym of *jurisprudence* in the sense of " the sum of decisions respecting a question." *Rattachement* is missing, though *règle de rattachement* is a well-known term of international private law; it signifies " the rule stating which of various systems is applicable to a case." Under *renvoi*, we are given the meanings " postponement " and " referring a matter in dispute to the court," but not " reference to a foreign law as applicable to the matter." Under *réintégrer*, the meaning " to reinstate a person in the possession of property " is given, but not " to return to the conjugal residence " (used of wife or husband, though the *Académie* deprecates the latter application).

Again, *condamnation* is translated by " conviction," " sentence." But the word is not restricted to criminal law; and expressions like *condamnation aux dépens* are common. A serious error, by the way, is the translation of *passer condamnation* by " to pass sentence " and " to pass sentence " by *passer condamnation*. Surely, *passer* is here what philologists call a false friend, temptingly similar in etymology and sound but none the less different in meaning. The correct French word is *prononcer*. *Passer condamnation* denotes such things as " to confess oneself to be in the wrong," " to submit to a judgment " in the sense of " not to appeal " and so on. There are other slips. *Précompter*, for example, does not mean " to debit what has already been paid." On the contrary, it means " to debit one's creditor in advance with what he will owe one in the future." If you give your maid 55s. instead of 60s., her wages, because you will subsequently pay the 5s. which she must contribute to her insurance, that is " a previous, anticipatory debiting," a *précompte*. The noun, incidentally, is not listed in the dictionary. *Jouer*, instead of *joueur*, for " gamester " is probably a misprint.

More attention is paid to Scots law terminology than in the first edition. There are still, however, many omissions, and it is not clear on what basis the selection has been made. There is, for instance, no reference under *lésion* to the equivalent in Scots law.

Such minor flaws are unavoidable in a work of this kind. There is no doubt that this edition will prove even more useful than its predecessor. It can be warmly recommended to all—scholars and practitioners—who have to deal with French law.

DAVID DAUBE.

Dictionnaire juridique français-allemand et allemand-français. Par R. Piccard, E. Thilo et E. Steiner; tome premier, français-allemand. Zurich : Schulthess & Co., S.A. 1950. Pp. XII + 596. Price Sfrs. 56. – .

One of the difficulties and attractions of comparative law is that it often involves a certain amount of comparative philology. The same necessity, however, may arise within a single system, namely, where

the population of a State speaks different languages, all of them recognised. In Switzerland, every federal law must appear in German, French, Italian and Rhaeto-Romanic; and Swiss lawyers are old hands at translating legal terms or, at a pinch, coining an equivalent. It is, therefore, with high expectations that one opens a French-German legal dictionary composed by three Swiss advocates, of Lausanne, in the French-speaking region, and Aarau, in the German-speaking. Let it be said at once that their work—the labour of 15 years—is of the highest standard: it is complete, exact, to the point, and neatly arranged.

The dictionary covers the entire French legal language; that is to say, even words which occur only in French law but not in Swiss are included—such as "*recréance*" in the sense of "provisional enjoyment of income which is the subject of a lawsuit." It is evident that this greatly enhances the general importance of the work. Again, the authors have not confined themselves to legal terms in the narrow sense, but they give also non-legal words that play a prominent part in laws or legal literature. It is indeed arguable that, particularly in the first third or so of the dictionary, they have gone rather far in this direction. The listing of phrases like "*a fortiori*," "*a priori*" and so forth is quite in order: they occupy a special place in legal reasoning. But why should "*désespoir*" or "*de profundis*" be mentioned? If "*désespoir*," why not "*espoir*" and "*succès*"? All cases are not hopeless. In yet one more respect the authors have wisely decided in favour of comprehensiveness: obsolete terms are quoted provided (it seems) there is still a chance of coming across them in some old document or other. To this class belong, *e.g.*, "*nouveleté*," "interference with possession," and "*rédarguer*," "to find fault with."

The German renderings are as a rule admirable. Here and there a rendering may be said to be a kind of Swiss German rather than good High German. When "*très subsidiairement*" is translated by "*subeventuell, subeventualiter*," this may be approved by Swiss readers, for obvious reasons accustomed to a large dose of Latin elements in their German speech. But it is not satisfactory; something like "*an letzter Stelle*" or "*notfalls*" may be preferable.

A British jurist might find it a rewarding task to collect the English terms which now count as part of French legal vocabulary. He would, for instance, discover the significant fact that there is no French word for "lock-out." (There is a German equivalent, "*Aussperrung*.") "Lock-out" is the word used. This brings us to the various types of strike, all but one clearly distinguished in the article "*grève*." The one missing is such a recent invention that it could not have been included: the "*grève de zèle*," when the French customs officers at Calais, in order to compel the Government to give them an increase of salary, searched the travellers so carefully that trains and boats were many hours late.

The authors are to be congratulated on their achievement. They have rendered a signal service not only to their own countrymen but to comparative lawyers all over the world. This dictionary will have to find a place in every good law library. It is to be hoped that the second volume (German-French) will follow in less than 15 years.

DAVID DAUBE.

The History of Capital Punishment. By George Ryley Scott. 1950. London: Torchstream Books. Price 21s. net.

In the concluding paragraph of this book we read, "Certain of these proposed reforms are universally applicable and desirable: that is, they are applicable and desirable whether or not culpable homicide continues to be punishable with death"; and from this we must conclude that Mr. Scott is not acquainted with the terminology of Scots law.

In the first two parts of this work Mr. Scott discusses at some length the historical, sociological and psychological aspects of capital punishment; and this is followed, for those whose tastes run in that direction, by a dissertation on the technique of capital punishment accompanied by appropriate gruesome illustrations. The reader thus suitably introduced to the horrors of capital punishment may then follow the author in what is doubtless intended to be an impartial examination of the case for and against the death penalty: but the author's bias is only too clear.

This is a thorny problem on which many and diverse opinions must inevitably be held; and despite the author's poor view of it, public opinion will in the end determine the course of action any government will take. And public opinion swings violently first one way and then the other. It has moved from early times when the mere death penalty was not in itself considered adequate, to the period between the wars when public opinion was rather against capital punishment and juries were reluctant to convict if the death penalty would follow. Since the last war, with the increase of crimes of violence, opinion would seem to favour retention of the death penalty. Now the Report of the Royal Commission is awaited. When it does come the problem will be widely discussed once more. Until then, anyone interested in finding all the arguments marshalled together may consult Mr. Scott's book.

Craies on Statute Law. Fifth Edition. By Sir Charles E. Odgers, Barrister-at-Law. 1952. London: Sweet & Maxwell, Ltd. Price £5 10s. net.

The sphere of the common law still unfettered by statute is steadily shrinking and it is distressing to find how much of modern life in Britain is controlled and restricted by statutory provisions enjoining this and, more frequently, prohibiting that. In consequence, a great part of judicial time is taken up nowadays by the examination of statutory provisions, and the considerations which have to be borne in mind in interpreting legislation are accordingly assuming an ever greater place in the lawyer's knowledge. Unfortunately the legislation of this country is not of the clearest though the view has been advanced that this is due in some measure to the attitude of the courts whose traditional aversion and hostility to restrictive legislation has too often led them to adopt a narrow and rigid interpretation requiring in reply an Act which seeks to defeat a hostile court, rather than to indicate a general course to a court willing to accept and act on such a lead. Judicial criticism of legislation abounds though it is easier to pick holes in any statute than to draft a better one, given a legislative system

which permits a political assembly to chop and change a lawyer's draft. In recent years we have suffered as a manifestation and an instrument of the social revolution of our times, a plethora of new statutes which do nothing to ease the task of the courts in making sense of them.

But some at least of the faults are due to archaic follies which should be done away with. Thus the citation of statutes by regnal year and Parliamentary session is well calculated to confuse, as Carr pointed out in *Cambridge Legal Essays*, p. 71 (an essay which might well have been cited in *Craies* at p. 48), and it is a pity that the recent Statutes Revised did not take the opportunity to substitute citation by calendar year and chapter as the alternative to the short title, which last is the only way a practitioner ever remembers an Act.

Again there is punctuation. *Craies* informs us (p. 185) that punctuation forms no part of any Act. It is plainly contrary to reason to contemplate such large tracts of English prose without punctuation and the sooner Parliament can evolve some means by which punctuation can appear authoritatively the better. Incidentally the pages in *Craies* dealing with punctuation (pp. 184–6) cite no case later than 1903. But in *Alexander* v. *Mackenzie*, 1947 J.C. 155, Lords Mackay (at p. 161) and Jamieson (at p. 165) made observations on punctuation. In particular, Lord Jamieson was "not prepared to hold that in construing a modern Act of Parliament a court may not have regard to punctuation." This is consonant with common sense and is really necessary; all such reasonable assistance towards arriving at the meaning is surely legitimate and it matters little to counsel and judges, and still less to the parties whose rights are involved, whether the original Parliament Roll is punctuated.

On one or two other points it is doubtful if this new edition takes full account of modern trends. Thus pp. 72–3 tell us that a court cannot interfere to prevent a mere evasion of an Act. That is so, but the statement must surely be qualified by such a statement as that of Viscount Simon in *Latilla* v. *I. R. C.* [1943] A.C. 377, 381, that the courts do not now favour narrow ingenuity which seeks to take a case outwith the letter of a taxing provision. As Friedmann has recently noted in his *Law and Social Change* the general social purpose of the legislation is *in dubio* looked at.

Considering that *Craies* is regularly referred to in the Scottish courts and that it cites many, though, of course, not all the relevant Scottish cases, the Scot may be pardoned if he takes exception to some other points. There is a general absence of references in the Table of Cases to Scottish reports for cases in the House of Lords though sometimes four, five, or six English series are quoted; there is the old mistake as to the proper name of a married woman litigant, *e.g.*, *O'Donnell* (*or Millar*) v. *Galashiels Gas Co.* Once again we must draw attention to what Lord Macmillan wrote in 1933 in 49 L.Q.R. 1. Again a point which is peculiar (and often peculiarly confusing and infuriating) to Scotland is the "application to Scotland" section of a United Kingdom statute. This is apparently not mentioned in *Craies* though p. 438 comes near to doing so. So, too, there is the problem raised by the use of words in relation to Scotland which are meaningless in Scots law, such as "originating summons" in a Patents Act (see *Murray* v. *Comptroller-General of Patents*, 1932

S.C. 726) and the reference to "action of damages for conversion" in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, s. 13 (2). Nor do the increasingly important international conventions win a mention: see *Grein* v. *Imperial Airways* [1937] 1 K.B. 50. It may be, too, that if the case of *Inland Revenue* v. *Glasgow Police Athletic Association*, 1952 S.L.T. 136 goes further we may have some dicta shortly on the question (pp. 109, 438) of the equal treatment of taxing statutes in England and Scotland.

To turn, however, to the many very substantial merits of this new edition. The general arrangement and scope of the book follow closely the lines of the last edition of 1936 although the print and make-up have been improved and the side-notes taken into the text as sub-headings. The principal recent cases and dicta have been duly incorporated and there has been very material revision of the chapters on the Crown, statutory duties and delegated legislation to keep these in touch with modern developments. Moreover, this edition could well be put into the hands of students of constitutional law as there is a wealth of information on drafting and citing statutes, on their editions, on proving them, on their titles and so on. In this respect *Craies* scores heavily over *Maxwell on Statutes*; it is both more readable and more informative. Again, the sections on delegated legislation and local and private acts are particularly informative in the same way. The general revision of the body of the text, as one would expect of the learned editor, has been skilfully done.

The Appendices include the Interpretation Act, 1889, and a useful list of popular titles of Acts; of these the most familiar to the Scottish lawyer are the Aberdeen, Montgomery, and Rutherfurd Entail Acts. But it is erroneous to call *Regiam Majestatem* the oldest preserved Scots *Act*. It is a treatise, and a better reference to the *Regiam*, apart from the Stair Society edition of 1947, is—Scottish Acts, Record edition, I, 135. The only other slips we have noticed are merely verbal: on p. 282 *Borthman* should be *Boothman*; and on p. 285, note (*m*) *Stanfield* should be *Stansfield*. But nevertheless the new *Craies* is a good edition of a valuable book.

D. M. Walker.

A Treatise on Wills. By Thomas Jarman. Eighth Edition. By Raymond Jennings, Q.C., assisted by John C. Harper. 1951. London : Sweet & Maxwell, Ltd. In Three Volumes, price £13 13s. net.

This is the eighth edition of what has for long been the standard English textbook on the law of wills. The first edition appeared in 1843, the seventh in 1930. The present editor, having decided that the seventh edition was already long enough, and that the eighth must be no longer, has found it necessary to excise, not only citations of individual cases no longer considered to be of general importance, but also the subject of insolvent estates and the chapters on the Rule in Shelley's Case and other analogous rules which have been obsolete since 1926. The result of this severe pruning is a monument to the editor's industry and patience, 2,072 pages of text, 99 pages of index and a table of cases filling 320 pages.

The English law of wills is a subject as peculiar to England as the Scots law of wills to Scotland. It is seldom that a Scottish lawyer can get help from a consideration of English authorities, or an English lawyer help from Scots authorities. Even where a similarity of development seems to exist, it may be no more than superficial, and thus doubly dangerous. The words " charity " and " charitable " are frequently used by testators both in England and Scotland, with resulting financial benefit to the legal profession. Between Scots law and English law in the matter of charitable trusts there is a radical distinction, which was emphasised by the Lord President in *Wink's Exrs.* v. *Tallent*, 1947 S.C. 470, where the First Division refused to follow *Chichester Diocesan Fund* v. *Simpson* [1944] A.C. 341, an English decision on English law. Chap. X of the new *Jarman*, which deals with gifts for illegal, superstitious and charitable purposes in considerable detail, is one of the few chapters where the editor has drawn on Scots authorities. In this chapter there is an interesting catalogue, some pages in length, of what have been held, in England, to be charitable purposes under the notorious Statute of Elizabeth. This is followed by a list of institutions held charitable or not charitable under United Kingdom taxing statutes. In this second catalogue there are nine Scottish tax cases, eight relating to particular institutions or associations, the ninth being *Jackson's Trs.* v. *Lord Advocate*, 1926 S.C. 579. The argument in *Jackson's Trs.* raised sharply the issue whether, and, if so, how, the content in Scotland of the words " charitable purposes " in a United Kingdom taxing statute is to be determined according to the law of England, as a necessary consequence of the House of Lords decision in the English case of *Commissioners of Income Tax* v. *Pemsel* [1891] A.C. 531. In *Jackson's Trs.* the Lord Ordinary rejected this contention; the First Division did not deal with it directly. In all the subsequent Scottish tax cases referred to by the editor of *Jarman* it seems to have been assumed, as the editor of *Jarman* assumes, that the Court of Exchequer in Scotland must construe " charitable purposes " in tax cases according to the law of England. Yet *Wink's Exrs.* appears in the new *Jarman* as a footnote to *Jackson's Trs.* However, the issue raised in *Jackson's Trs.* has recently been exhumed in *Commissioners of Inland Revenue* v. *City of Glasgow Police Athletic Association*, 1952 S.L.T. 136, in good time for the next edition of *Jarman*.

But this is a very minor criticism to make of an altogether excellent book, now making its third appearance in a new edition since 1894, during which time there has been only one supplement to *McLaren on Wills and Succession*.

JOAN SMITH.

Latey on Divorce : *The Law and Practice in Divorce and Matrimonial Causes*. Fourteenth Edition. Edited by William Latey, M.B.E., K.C., assisted by John Latey, M.B.E., B.A., J. B. Gardner, M.A., and D. R. Le B. Holloway, LL.B.(Hons.). 1952. London. Sweet & Maxwell Ltd. Price £6 6s. net.

It is all too easy for the Scots lawyer to condemn out of hand as irrelevant and then ignore an English textbook on Divorce Law and

Practice. It is, of course, unquestionable that the law and practice in consistorial causes in Scotland is by no means the same as that in matrimonial causes in England. Nevertheless it would be a mistake verging on folly for a Scottish lawyer to remain unaware of this valuable new edition. Occasions repeatedly arise when reference to other than a Scottish textbook is necessary. A question may never have arisen for consideration in Scotland and it is desirable to have guidance on the views of the English courts on the same topic. Again circumstances may require an investigation of English law and practice to see if a client's remedy is there, and, not least, the scope of *Latey* is such that many sections can be fully and properly utilised by a Scottish practitioner.

This new edition is opportune in that the English law has recently been consolidated in the Matrimonial Causes Act, 1950, while other recent legislation has modified many more topics. The consequential changes have been effected in this edition; other features of the new edition are the increased quotations from judgments and the division of the text into numbered paragraphs to facilitate reference. As hitherto, the book falls into two parts, each of upwards of 500 pages, dealing firstly with the law of marriage and divorce, and secondly with the practice in matrimonial causes. The latter part is of less importance and value to the Scot, though it makes extremely interesting reading, and has a distinct fascination as a text for comparative legal study, but even here one should not lose sight of the chapter on Judgments Extension.

But it is in the first part of the book, relating to the substantive law, that one will find material of great value even in Scotland. Such topics are the nature of Christian marriage, the form of English marriages, domicile, jurisdiction in divorce and nullity, proof of foreign marriages, contraceptives, periods of gestation, what constitutes connivance, the effect of foreign divorce decrees, and the conflict of matrimonial laws. Moreover on these general and not peculiarly English points, there is adequate reference to Scottish authority, down to the very recent *Lyall* v. *Atholl Palace* on expenses under Legal Aid. Again, in view of the Maintenance Orders Act, it is highly pertinent to the Scots lawyer to be able to find a chapter on the summary jurisdiction, whereby such orders are granted, and information on the enforcement procedure.

The revision has been thorough and brings the law down to the beginning of 1952 and the resulting volume can be commended in Scotland too as likely to contain an answer if a matrimonial problem has ever been discussed in these islands. For England we have no authority to speak but there seems no doubt that it will guide through many dark places, even to the final bill of costs. It should also be noted that the appendices contain a full collection of annotated statutes, a feature of great practical utility.

There is an amusing misprint on p. 498 where it is stated that a Jewish religious divorce may be granted on the ground inter alia of the husband's " immortality "! And on p. 504 a petition is not drafted by " council."

D. M. Walker.

OTHER PUBLICATIONS RECEIVED

(A later review is not precluded, especially where books are received shortly before going to press.)

Economic Aspects of Sovereignty. By R. G. Hawtrey, Henry Price Professor of International Economics at the Royal Institute of International Affairs. Second Edition. 1952. London: Longmans, Green & Co., Ltd. Price 24s. net.

Company Meetings. By W. F. Talbot, F.C.I.S., F.T.I.I. "Business Law and Administration" Series, No. 3. 1951. London: Stevens & Sons, Ltd. Price 22s. 6d. net.

Israel's Armistice Agreements With the Arab States. By Shabtai Rosenne. 1951. Tel Aviv: Blumstein's Bookstores, Ltd., for The International Law Association, Israel Branch.

The Commonwealth of Australia: The Development of its Laws and Constitution. Under the General Editorship of G. W. Paton, M.A., B.C.L., with Specialist Editors. The British Commonwealth: The Development of its Laws and Constitutions. Under the General Editorship of George W. Keeton. Volume 2. 1952. London: Stevens & Sons, Ltd. Price £2 15s. net.

The Republic of India. By Alan Gledhill, M.A., I.C.S. (retd.), Barrister-at-Law. The British Commonwealth: The Development of its Laws and Constitutions. Under the General Editorship of George W. Keeton. Volume 6. 1951. London: Stevens & Sons, Ltd. Price £2 5s. net.

Morals and Law: The Growth of Aristotle's Legal Theory. By Max Hamburger. 1951. Newhaven: Yale University Press. (London: Geoffrey Cumberlege.) Price 24s. net.

Sectional Biases in Congress on Foreign Policy. By George L. Grassmuck. The Johns Hopkins University Studies in Historical and Political Science, Series LXVIII, No. 3. 1951. Baltimore: The Johns Hopkins Press.

Party and Constituency: Pressures on Congress. By Julius Turner. The Johns Hopkins University Studies in Historical and Political Science, Series LXIX, No. 1. 1951. Baltimore: The Johns Hopkins Press.

The Law of Nations: Cases, Documents and Notes. Second Edition. Edited by Herbert W. Briggs. 1952. New York: Appleton-Century-Crofts, Inc. Price $8.00 net.

JURIDICAL REVIEW

THE DEVELOPMENT OF REPARATION

IT is by no means easy to sketch, even in broad outline, the development of the law of reparation in Scotland. The early forms and the changes involved in the transition to recognisably modern forms of action are involved in no less obscurity than most other branches of early law. Even the more recent developments are not always easy to understand or to disentangle, still less can one ascertain when and why certain developments took place. Some attempt, however, is made here to determine broadly what the main lines of development have been.

In early and undeveloped systems of law there is very commonly no clear distinction between public and private wrongs, that is, between torts or delicts and crimes,[1] and the same wrong might give rise to proceedings under either head, while what was considered in earlier times to belong to the one class may later be considered to come under the other.[2] Furthermore, in early society the possible types of claims for redress of wrongs are much more limited than those which later become distinguishable, and they can be reduced broadly to physical injury and interference with the possession of property. The earliest forms of reparation found in Scotland are designed to redress these two kinds of wrongs.

The early general form of redress for physical injury was assythment, the indemnification due to the heirs of a deceased person from the person guilty of the crime. Balfour[3] in later times described it as "amendis for

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1 Pollock and Maitland. II, 449; Holdsworth, H.E.L. II, 43.

2 *Cf.* the Roman *furtum* which might be either a crime or a delict; Buckland, *Textbook of Roman Law*, 583. A glimpse of the transition stage may be seen in *Regiam Majestatem* (Stair Society) IV, 28.

3 *Practicks*, 517.

slauchter or mutilatioun " payable by the person who had committed slaughter to the kin, bairns and friends of a person slain " in contentation of the hurt, damnage and skaith sustenit be thame throw the wanting of the persoun that is slane, and for skaith incurrit be thame thairthrow and for pacifying of their rancor." The amends payable were calculated according to a scale nicely graduated according to the status of the injured person. The commutation of the death-penalty into a monetary payment was the first stage in the control and ultimate disappearance of the blood-feud, and it is a regular feature of Anglo-Saxon, Celtic [4] and Germanic law. Instead of shedding blood in revenge for the blood of their kinsmen, the deceased's relatives accepted a composition from the wrongdoer's clan.[5] Thus there appear in the *Regiam Majestatem* [6] lists of the tariff for the death of persons of various grades and for the price of blood and injuries. The terms used are variously *Cro*, *Galnes*, *Enach* and *Kelchyn* [7] but all are Celtic terms signifying the " honour-price " attaching to the various grades of society and measuring the compensation payable to the victim's kinsmen.

These chapters of the *Regiam* [6] are of Celtic origin representing a version of the so-called Laws of the Brets and Scots. Some such code would appear to have prevailed at least in substance in Strathclyde and Galloway and in some parts of the Highlands until at least 1305 when the code was proscribed by Edward I.[8]

A tariff of this kind was quite common in early systems of law. Tacitus [9] mentions homicide being appeasable in early Germany by a fine paid to the *universa domus*. In

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[4] *Cf.* Ancient Laws of Ireland, quoted in Cameron, *Celtic Law*, 132–3.

[5] See further P. & M. II, 243–4, 450; Holdsworth, H.E.L. II, 36; Maitland, *The Kindred and the Bloodfeud*, Coll.Papers, ed. Fisher, I, 202.

[6] IV, 36–40.

[7] Those terms are discussed in *Sources and Literature* (Stair Society) 348; Cameron, *Celtic Law*, 186 *et seq.* See also Skene, *De Verborum Significatione*, *sub voc.* Skene, *Celtic Scotland*, III, 217.

[8] A.P.S. I, 122 and 178. See also Hailes, *Annals of Scotland*, I, 350; Cameron, *Celtic Law*, 145; Mackinnon, *Constitutional History of Scotland*, 40.

[9] *Germania*, c. 21.

Anglo-Saxon law the same prevailed under the name of *wergild* and Bankton [10] noted that *cro* and *wergild* both seemed to have their foundation in the Mosaic rule of an eye for an eye and a tooth for a tooth,[11] from which it is but a small step to " For ane fute, ane marke; For ane tuth, 12 pennies." [12] Similar tariffs may be found in the Ancient Laws of Ireland [13] and generally among Anglo-Saxon and Germanic peoples.[14] In Germany *wergild* survived into the Sachsenspiegel.[15]

Various other kinds of physical injury are mentioned in these chapters of the *Regiam*. There is rape [16] treated purely as a crime and not a delict, fatal injuries inflicted by a horseman,[17] for which *Cro* and *Galnes* is payable unless the horse were backing, shedding of blood,[18] and minor injuries [19] with a carefully graduated scale of compensation. Other wrongs also mentioned in the *Regiam* are falsehood and fraud [20] and theft [21] both treated purely as criminal causes.

Leaving these aside it seems evident that assythment was a development of these primitive rules for regulating the blood-feud. The provisions of the *Regiam* are too scanty to give much indication of the true scope of this remedy and it is only from later authorities that a comprehensible account may be gathered. Assythment, it appears, was principally pursued by the wife, children or next-of-kin of a person slain, and it extended not only to homicide but also to mutilation or physical injury,[22] and, at least much later,

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[10] I, 10, 18, note.
[11] Exodus, xxi; *cf.* Leviticus, xxvii; Numbers, xxxv, 31–2.
[12] R.M. IV, 40.
[13] Cameron, *Celtic Law*, 121 *et seq.*
[14] Robertson, *Scotland under her Early Kings*, II, 275 (Appx. E).
[15] III, 45; Huebner, *History of German Law*, 66. Compare the provisions of the Salic law; Brissand, *History of French Private Law*, 565.
[16] IV, 8.
[17] IV, 24.
[18] IV, 39.
[19] IV, 40.
[20] IV, 13.
[21] IV, 19.
[22] Stair, I, 9, 7. *Blair* v. *Montgomerie*, 1556, Balfour, 518; *Niddrie* v. *Boyd*, 1661, Gilmour, 1; *Cheyne* v. *Mowat*, 1673, Pitmedden, S.192; *Fowlis* v. *Lamont*, 1685, *ibid.*

it extended to rape.[23] Assythment was always partly civil and partly criminal and regard was to be had to both the interest of the victim and that of the public.[24] This is further reflected in the provision that assythment was only demandable by the relatives if the offender were not executed for his crime [25] although this was early recognised to be anomalous.[26] It might, however, be demanded if for any reason he should escape the gallows, as by death,[27] insanity,[28] flight or fugitation,[29] verdict of culpable homicide,[30] or even royal remission or pardon.[31]

In the early period no distinction seems to have been taken between culpable or wilful and merely negligent homicide or injury. The terms Balfour refers to,[32] "slauchter and mutilatioun" probably originally extended to all kinds of physical injury to the person [33] though later "slauchter" came to mean unpremeditated homicide [34] while mutilation meant intentional injury.[35]

The remedy of assythment was open to a wide class of relatives described as "kin, bairnis and friendis" [36] including collaterals [37] and possibly bastards.[38] By Stair's time it was

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23 *Col.Charteris*, 1723, Hume, II, 123.

24 Stair, I, 9, 7; Balfour, 516; Hume, I, 118.

25 Hume, I, 284.

26 Mackenzie, *Observations on the Act 1621 anent Bankrupts*, pp. 12–13, in Works (1722), II, 2.

27 *Stewart* v. *Earl of Fife*, 1768; 1 Hailes, 206, *per* Lord Pitfour.

28 *Somerville*, 1704; Maclaurin, 99.

29 *Stewart*, *supra*.

30 *Stewart* v. *Story*, 1785, 5 B.S. 646; *Machargs* v. *Campbell*, 1767, Maclaurin 673; Mor. 12541; Kames, Sel.Dec. 326.

31 Hume, I, 285.

32 *Practicks*, 517.

33 Stair, I, 9, 7.

34 Mackenzie, *Criminal Law*, I, 11, 1.

35 Pitmedden, *Mutilation and Demembration*, Ss. 7, 8; *cf.* Craig, J.F. II, 8, 31 (Clyde's Trans. I, 536).

36 Balfour, *Practicks*, 516; Hume, I. 118.

37 *Edmestoun* v. *Wauchope*, 1603, Pitcairn, II, 403; *Drews* v. *Horn*, 1611, Mor. 13904; *Carnegie*, 1728, Hume, II, 124; *Machargs* v. *Campbell*, 1767 Maclaurin, 673. Contrast the modern action of damages where collaterals have no title to sue; *Greenhorn* v. *Addie* (1855) 17 D. 860; *Eisten* v. *N.B. Ry.* (1870) 8 M. 980.

38 No share; *Montgomerie* v. *Barclay*, 1555; Balf. 516; *Falconer* v. *Maxwell*, *ibid.* Half-share or in the judge's discretion; *Forest* v. *Clerkingtoun*, 1542, Balf. 517. Hume, II, 124, very much doubts such a claim.

principally pursued by the wife, children or nearest of kin.[39] All the relatives entitled to prosecute the action had to concur in one action; one could not sue alone even though he offered caution to satisfy the claims of other entitled parties.[40] The heir was entitled to a share like the rest of the children, though a lesser share; the wife was to have a share like the children, and unmarried daughters twice as much as the sons.[41]

A style in the Ayr MS.[42] is addressed by the King to the relatives of a pauper on both paternal and maternal sides calling on them to contribute according to their means, as was the custom in the time of King David, towards defraying the fine imposed on him in connection with the death of a third party. It is not clear what the fine referred to is, but it may relate to assythment as the fourteenth century was not wont to punish murder by fine.

The Act 1592, c. 67,[43] provided that before any remission for slaughter be granted, either letters of Slains must be produced, *i.e.*, an acknowledgment by the wife or nearest relations that they have received satisfaction; or otherwise the offender must find sufficient caution to satisfy them, at the modification of the Lords for the assythment; such satisfaction is not due where the defender suffers death for the crime, that being held a sufficient antonement.

Litterae pacis or letters of Slains[44] were letters signed by the four principal branches of the kindred of the deceased or the greater part of them, bearing receipt of the assythment, granting oblivion of the injury, discharging the offender of all action, civil or criminal, at their instance, on that account and requesting the King to grant him a remission. Later, however, this was relaxed so that a remission might pass in Exchequer without production of the letters of Slains, on surety found there to the satisfaction

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[39] Stair, I, 9, 7.
[40] *McCartnay* v. *N.*, 1541, Balf. 517.
[41] Balfour, *Practicks*, 517, No. 4.
[42] lxxvi, Register of Brieves (Stair Society), p. 51.
[43] A.P.S. III, 575. Bankton, I, 10, 14, ascribes it to c. 157.
[44] Specimen in Dallas's *Stiles* (1697) p. 862.

of the court, for payment of such a sum as should afterwards be awarded.[45]

Assythment survived down to the nineteenth century when, as has been shown elsewhere,[46] it existed for a time contemporaneously with the newer *actio injuriarum* for solatium to the relatives of the deceased and was then in practice superseded by that form of action.

So much for the present as to reparation for death; it is now necessary to consider reparation for dispossession of property, and this is an equally thorny matter. The earliest trace of an action of reparation relating to the dispossession of property is novel dissasine. The word "sasine," or "seisin," the English form of the word,[47] means possession and hence novel dissasine is recent dispossession. In Scots law the word "sasine" has survived down to the present time, denoting the delivery of possession of land, which was till 1845 effected symbolically on the ground [48] in presence of a notary public and thereafter [49] by expeding and recording in the appropriate Register of Sasines an Instrument of Sasine with the narrative that sasine had been given. Instruments of Sasine recording such transactions go back to about 1400 [50] and the Register of Sasines dates from 1617 but prior to that sasine was presumably a question of fact evidenced only by actual or civil possession and the knowledge of the countryside.[51] There were then in the early period no Sasine Registers and probably no Instruments of Sasine and few written titles. Hence dissasine or dispossession was a matter of grave consequence and not uncommon in an unsettled country; the protection of a

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[45] Hume, I, 284; see also II, 124, and Alison, I, 91.

[46] Solatium, 1950, 62 Jur.Rev. 144.

[47] As to which see P. & M. II, 29 *et seq.*; Maitland, *The Mystery of Seisin*, Coll. Papers, I, 358; *The Beatitude of Seisin, ibid.*, 407.

[48] For descriptions of the ceremony see Bell's *Conveyancing*, I, 650–1; Menzies on *Conveyancing*, 570.

[49] Infeftment Act, 1845.

[50] Specimen in Erskine, II, 3, 34, correcting conjecture of Craig, J.F. II, 2, 18.

[51] Craig, II, 7, 2, says that the Instrument of Sasine arose from want of certainty and frauds in connection with the delivery of possession. See also Stair, II, 3, 16.

person's possession was a matter of great importance to him and also for the peace of the country.

The first mention of redress to an individual who complains of recent dispossession (*de nova dissasinâ*) in Scotland is in the Assisa Regis David I, c. 35,[52] dating from 1153, which provides that brieves of mortancestor and new disseising are no more to be impleaded by challenge of the party asking but only by an assise of the good country and no other ways, and no claim lies in the proceedings because the 12 chosen of the good men of the country shall give their verdict only according to the points and articles of each brieve, and what the assise pronounces in their verdict right, that doom shall be given to the parties.

The authenticity of this passage is very much open to question. Skene doubted it to the extent of assigning it to David II, and thereby post-dating it 75 years, to overcome his suspicion. Furthermore it antedates the generally accepted date for the invention of the Assise of Novel Disseisin in England, which is generally ascribed to 1166.[53]

The statute of Alexander II, c. 7 (1230),[54] again purports to introduce the remedy into Scotland and it echoes the words of the English writ. The disseisor was to restore the lands and to be in the King's amerciament. Again the Leges Quatuor Burgorum, c. 99,[55] mention the topic: if a burgess is put out of possession, he is first to be restored before answering him who put him out. This passage includes the results of a conference held at Newcastle: the date is unknown but attributed to 1270.[56] Then in *Regiam Majestatem*, III, 36, which is founded on Glanvill, XIII, 32 and 38,[57] novel dissasine is found stated in these terms: "When any person dispossesses another man of his freehold (*de libero tenemento*) unjustly and without the warrant of

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[52] A.P.S. I, 325; also R.M.(Stair Society) Supp. No. 20.
[53] P. & M. I, 145; II, 47.
[54] A.P.S. I, 400.
[55] A.P.S. I, 352.
[56] Bateson, *Borough Customs* (Selden Society), I; *cf.* Baird Smith, xxi S.H.R. 194.
[57] The two texts are collated in A.P.S. I, 171–2.

a decree of court the victim can avail himself of this to recover possession of his land."

It is worth while digressing momentarily to notice the phrase *de libero tenemento*. In England it meant, or was shortly coming to mean, as it did down to 1925, freehold, that is, land held in fee simple or fee tail and not merely for a term of years. In two passages in *Regiam Majestatem* an explanation of the phrase is attempted, the former of which [58] suggests that freehold may mean only liferent or tenure for a term of years, and the latter [59] that it may be something less than a fee in the land. Furthermore, the styles of brieves of novel dissasine found in the Ayr and Bute MSS.[60] do not mention *liberum tenementum* but go beyond the current English remedy of novel disseisin in allowing it to one who was vested and seised of land (i) *ut de feodo*; (ii) *ut de dote*; and *ad terminandum qui nondum praeteriit*, and similarly a fragment, possibly of c. 1320,[61] makes it fairly clear that *feodum* and *liberum tenementum* corresponded to fee and liferent.[62]

Returning, however, to the main line of inquiry, the Statutes of Robert I of 1318 [63] assume the use of the remedy and c. 13 expands it to cover the results achieved by the English justices under Henry III and Edward I.[64] It provides that in future not only the disseisor but his infefter if he be living is to be named in the brieve. If there are several disseisors the brieve is not to abate by the death of the principal of them but recovery may be effected so long as the possessor can find a holder of the lands or a disseisor who was a party to the disseising. Each disseisor is to be liable jointly and severally and future disseisors by

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58 R.M. IV, 37, in A.P.S.=R.M.(Stair Society), Supp. No. 19.

59 R.M. IV, 40, in A.P.S.=R.M.(Stair Society), Supp. No. 22. See notes thereto and Cooper, *Freehold in Scots Law*, 1945, 57 Jur.Rev. 1.

60 Register of Brieves (Stair Society), pp. 40, 62.

61 A.P.S. I, 721–2.

62 *Cf.* also Craig, II, 17, 42; III, 3, 28, and particularly II, 7. 28; Skene, *De Verborum*, S.vv.

63 A.P.S. I, 470; also found in *Registrum Vetus de Aberbrothoc* (Bannatyne Club, 1848), 248–9.

64 P. & M. II, 53–6.

force of arms are to be adjudged to prison and to pay a great amerciament at the King's will. Other chapters of the same legislation [65] treat further of the topic.

The origin of this famous remedy is the assize of novel disseisin introduced by Henry II in 1166,[66] a summary possessory action to protect possession independently of ownership. By the writ which commenced the English action the sheriff was bidden to summon 12 men to declare whether since some recent date, for instance, the King's last voyage to Normandy, the defendant had unjustly and without judgment disseised the plaintiff of his free tenement in a certain vill.[67] The assize protected possession even though without title, vicious and thoroughly wrongful.[68] From the time of Richard I the English plea-rolls were covered with assizes of novel disseisin and it had become the most widely used of all the forms of action.[67]

While then this remedy came to Scotland from England that was not its ultimate source. For there can be no doubt that this action was suggested by the *actio spolii* of the canon law and this in turn had its origin in the Roman possessory interdict *unde vi*.[69] So too it was not peculiar to English or Anglo-Norman law but may be found in medieval French law.[70] In Germany too the canon law had developed the action of spoliation out of the *interdictum unde vi*.[71] In the Middle Ages the Church sought to counter the disorders relating to possession by the *remedium spolii* and the *exceptio spolii* which operated on the basis of the maxim *spoliatus ante omnia restituendus*. From being restricted to ecclesiastical discipline they became common law remedies.[72] In 1215 Pope Innocent III issued the Decretal *Saepe*

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65 c.c. 16, 19 and 25 (A.P.S. I, 471).
66 Holdsworth, H.E.L. II, 189, 282.
67 P. & M. II, 48.
68 *Ibid.* 49.
69 P. & M. I, 135; II, 48; Holdsworth, H.E.L. II, 204.
70 *e.g.*, Très Ancien Coutumier de Normandie, Coutumes de Beauvoisis. It will be remembered that Henry II was not only King of England but master of Normandy, Anjou and Aquitaine. See further Engelmann, *History of Continental Civil Procedure*, 692 *et seq.*
71 Huebner, *History of Germanic Private Law*, 216.
72 Brissand, *History of French Private Law*, 318–320.

Contingit [73] which extended the original remedy to make it available against a third party who received the thing with knowledge of the spoliation, *i.e.*, a *mala fide* possessor. The canonists went even further and claimed authority for a possessory action against even the *bona fide* possessor [74] though this distinction never appears to have troubled England or Scotland.

The procedure in a claim of novel dissasine was by brieve.[75] It is addressed by the King to the justiciars and narrates the complaint that another person has disseised the complainer of his land *injuste et sine judicio* of which he had been vested and seised *ut de feodo vel de dote vel firma ad terminum qui dum preteriit* wherefor the justiciar is to take safe and sure pledges and then to ascertain by honest and loyal men of the land according to an assise if the facts are so; if the complainer has been unjustly ejected, the justiciars are to restore him to possession and to fine the intruder; otherwise they are to fine the complainer for bringing an unjustified complaint. The Scottish style of brieve is to the same effect as the English counterpart but with modifications in that the English writ was designed to protect freehold only, and the time limits which restricted the English remedy at least originally to recent disseisin [76] do not appear, so that "novel" has no significance.

When and why novel dissasine disappeared from Scotland is shrouded in mystery. Almost equally vague is the disappearance of the contemporary English assize of novel disseisin. Trespass *quare clausum fregit*, the action by which a tenant in possession could get damages for an unlawful disturbance of his possession, had already begun to supersede novel disseisin in the medieval period [77] and from

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[73] C. 18, X, de restitut.spol. 2, 13.

[74] Condictio ex canone *Redintegranda*, traced back to Decretum, c. 3, C. 3, qu. 1. And see Bruns, *Recht des Besitzes*, 163–262.

[75] For styles see Ayr MS., No. xxi (*Register of Brieves*, p. 40); Bute MS., No. 107 (*ibid.*, 62); St. Andrews Formulare, I, 254; Quoniam Attachiamenta, c. 53. As to procedure see further R.M. III, 36; R.M. Supp. Nos. 9, 10 and 20.

[76] Originally only disseisin since the King's (*i.e.*, Henry II's) last passage to Normandy. In 1275 a date in 1242 was taken as the base-year and this limited the assize till the time of Henry VIII; P. & M. II, 51.

[77] Holdsworth, H.E.L. III, 27; VII, 58.

an even earlier period it had been regarded as being in some cases supplementary to novel disseisin. Henry VI's statutes of forcible entries [78] gave actions of trespass and thereby encroached on the sphere of novel disseisin. Later trespass became the universal means of redress for wrongs to possession [79] and ejectment, a form of trespass, arose in the sixteenth century: together these superseded entirely the older real action of novel disseisin.

In Scotland there seems to be no statutory mention of novel dissasine after 1318 and the last recorded case seems to have been that between Thomas de Hay and William de Borthwick regarding the lands of Middleton in 1368.[80] It is possibly significant that in 1318, c. 25,[81] it was ordained that no man should be cast out of his free tenement in which he claimed to be vested and seised in fee without the King's pleadable brieve and that he should be reasonably warned to answer at a certain day and place for his free tenement. This seems like the germ of ejection. Ejection does not seem to have appeared *eo nomine* in the statute-book till 1567, after which it is regular. Again spuilzie seems to make its first appearance in the Act 1438, c. 2,[82] which enacts that the sheriff or lord of regality is to charge spuilziours and resetters to make restoration; if the latter were disobedient they were to be put to the horn as rebels, and if restitution were not made within 15 days, to be cited and "demained" as rebels, notwithstanding the old Act of 40 days. After 1438 legislation touching spuilzie is common and the Act 1457, c. 2 [83] speaks of two kinds of spoliation, of land and of movables.

It would appear accordingly that novel dissasine fell largely into desuetude round about 1400 [84] and somewhere

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[78] 8 Hen. VI, c. 9.
[79] Holdsworth, H.E.L. VII, 58.
[80] A.P.S. I, 505–6. It is mentioned in a charter of Robert I of 1328: *Registrum Vetus de Aberbrothoc* (Bannatyne Club), No. 360.
[81] A.P.S. I, 473.
[82] A.P.S. II, 32.
[83] A.P.S. II, 47.
[84] The existence of a brieve of novel dissasine in St. Andrews Formulare I, 254, indicates that it was still not entirely obsolete in the mid-sixteenth century.

about the same time it came to be replaced by spuilzie, which in turn was soon confined to movables, while ejection came to be the remedy for dispossession from heritage. Moreover, Craig [85] says that the Norman brieve of dissasine was "nothing else than the interdict for recovery of possession known to the Civil Law or than the action of spuilzie and ejection known to our own." Similarly Hope [86] refers to novel dissasine in the title "Of Ejection and Intrusion" but his instances are of the modern form.

Moreover, the very name of spuilzie is likewise derived from the *actio spolii* of the canon law which had originated in the Roman interdict *unde vi*. In *Ogilvie* v. *Restalrig* [87] the forms *spoliatio* and *spolium* are both used, while a case from the Auchinleck MS.[88] shows an intermediate form of the word in spuilziation. Moreover, the old canon law maxim *spoliatus ante omnia restituendus* which was at the basis of novel dissasine appears in many cases of spuilzie.[89] In *Somerville* v. *Hamilton* in 1541 [90] the report says *oportebat spoliatum semel restitui ante quam ipse spoliator possit justa quavis ratione possidere rem spoliatam*. The maxim is also found in the Act 1449, c. 8.[91]

Spuilzie is by far the most persistent form of action in early modern Scots law. It appears repeatedly in various connections from the early fifteenth to the mid-nineteenth century, being particularly frequent in the unsettled sixteenth and seventeenth centuries. Possibly its first appearance is in the Act of Robert I of 1318 [92] in the form of the *placitum de capcione catallorum*, though the styles remain silent as to it. It certainly appears in the Act 1438, c. 2 [93]

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85 J.F. II, 17, 25.

86 *Major Practicks*, VI, 15.

87 1541, Mor. 14730.

88 Mor. 14734.

89 *Somerville* v. *Hamilton*, 1541, Mor. 14737; *Strachan* v. *Gordon*, 1671, Mor. 1819; *Lady Renton* v. *Her Son*, 1629, Mor. 14733; *Yeoman* v. *Oliphant*, 1669, Mor. 14740. Morison puts the maxim at p. 14737 as a heading to a whole fasciculus of cases.

90 Mor. 14737.

91 A.P.S. II, 34.

92 A.P.S. I, 371.

93 A.P.S. II, 32

and the Act 1457, c. 2 [94] divided spuilzies into spuilzies of movables and spuilzies of heritage, but the term spuilzie soon came to be confined to movables and ejection came into use for heritable property.[95] These two together with wrongous intromission were applied generally to actions for the recovery of possession of property. Stair [96] defined spuilzie as the taking away or intermeddling with movable goods in the possession of another without the consent of the owner or due order of law. Elsewhere [97] he observed that it differed very little from the summons of ejection save that spuilzie was the dispossession of the possessor in movables while ejection was dispossession in heritable rights by infeftment : the tenor of the summons was much the same in each case.

The opinion has been expressed [98] that spuilzie was primarily a technical offence, as where goods were poinded without sufficient warrant. It is undeniable that in many such cases spuilzie was the appropriate remedy : thus if goods were poinded under a decree and a reduction of the decree were raised, an action for spuilzie became competent [99] ; again, if a third party appeared at a poinding and offered to make faith that the goods were his, the poinder had to prove that the goods belonged to the other, for otherwise the poinding would be a spuilzie.[1] But there are many instances where spuilzie was clearly not a technical offence and, especially in the sixteenth century and later, it is frequently impossible to distinguish spuilzie from theft or even theft with violence.[2] Compare the case described

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94 A.P.S. II, 47.

95 Balfour, *Practicks* 465 treats spuilzie and ejection together, but it is apparent from the instances cited that the distinction was clear and spuilzie belonged only to " gudis and geir " as in *Douglas* v. *Boig*, 1542 Balf. 475.

96 I, 9, 16.

97 IV, 30, 1.

98 Neilson in A.D.C. II, Introd. lxxi.

99 *Vanse* v. *Auchtertuil*, 1582, Mor. 13494.

1 *Wedderburn* v. *Hay*, 1543, Mor. 10503, *cf. Gibson* v. *Corsbie*, 1630, Mor. 10512; Spotiswoode, *Practicks*, " spuilzie and ejection " : all his instances are technical offences.

2 *Smith* v. *Allardyce*, 1521, Fife Shf.Ct.Bk. (S.H.S.) 229; Craig, J.F. II, 11, 30, says it is the equivalent of the Roman *actio vi bonorum raptorum*, on which see Buckland, *Textbook*, 584.

as " maisterful and violent spoliatioun under silance of nycht be way of brigance revin away takin and withaldin . . . furth of his bosum of his coitt betwix his dowblait and coitt of his purss." [3] Or again where one " maisterfullie reft and spuilziet fra him his lokit bulget and thairin iiij^{xx}ten pundis money of this realme " from another on the Quenis Ferry.[4] Again it lay against " wrangous, violent and maisterful spoliatioun of ony gudis and geir." [5] In fact spuilzie was quasi-criminal and was referred to in statute along with theft and slaughter as a criminal cause under the sheriff's jurisdiction.[6] Likewise by the Act 1438, c. 2 [7] the sheriff was to call on the " spoiliours or resetters " to restore the goods.

The ineffectiveness of the provisions against spuilzie can be seen from the repetition of measures directed to that end.[8] The same conclusion follows from the large number of cases which figure in the reports of the period. Spuilzie, like novel dissasine, depended on possession alone and did not require title by writ [9]; it lay against the taker and all accessories who had taken delivery of or harboured the goods.[10] It prescribed in three years under the Act 1579, c. 81.[11]

Spuilzie persisted down to the early nineteenth century, and it is interesting to note how throughout its history the idea of *spoliatus ante omnia* was maintained. Erskine [12] points out that in spuilzie the pursuer " need prove no more than that he was in the lawful possession of the subject libelled, which gives him a right to be *ante omnia* restored to the possession; for the action is grounded on this plain

[3] Littlejohn, *Records of the Sheriff Court of Aberdeenshire* (New Spalding Club), I, 159.
[4] *Dik* v. *Barry*, 1561, Acta Curiae Admirallatus Scotiae, 193.
[5] *Pittedie* v. *Lord Glamis*, 1515 Balf. 321.
[6] A.P.S. II, 144; *cf.* Balf. 466.
[7] A.P.S. II, 32; *cf.* Fife Shf.Ct.Bk. 257.
[8] *e.g.*, 1438, c. 2 (A.P.S. II, 32); 1449, c. 8 (A.P.S. II, 34); 1449, c. 7 (A.P.S. II, 36); 1457, c. 2 (A.P.S. II, 47); 1457, c. 19 (A.P.S. II, 50); 1457, c. 25 (A.P.S. II, 51); 1503, c. 9 (A.P.S. II, 242), etc.
[9] Stair, I, 9, 17; IV, 26, 2; Erks. IV, 1, 15; *Maxwell*, 1676, Mor. 14729.
[10] *Cowgrane*, 1629, Mor. 379; *Roxburgh* v. *Langtoun*, 1628, *ibid.*
[11] A.P.S. III, 145; Stair, I, 9, 24; IV, 30, 4; Ersk. III, 7, 16.
[12] IV, 1, 15; *cf.*, too, Bankton, I, 10, 126.

principle, that no man is to be stripped of his possession but by order of law." A supervenient title to the property would not save an ejector or spuilzier from an action for the wrong he had done.[13] Another interesting feature of spuilzie was the high scale of damages recoverable.[14] By his oath *in litem* the pursuer was entitled to the value of the goods according to his *pretium affectionis*, *i.e.*, according to what he swore it was worth to him, if it were not restored in as good condition as when taken away. Violent profits, such as might have been made of the goods by the utmost industry, were also awardable at the modification of the court, together with any other immediate loss.

Wrongous intromission is also frequently mentioned in the older books but this a really just a variant of spuilzie, the essence of which lay in the wrongous intromission with another's property. Thus we meet wrongous intromission and withholding of a ship,[15] spuilzie or wrongous intromission with teinds,[16] and "spuilzie or wrangous intromission with ony cornis, gudis or geir."[17] It also appears frequently in the Acta Dominorum in connection with maills and profits.

Ejection and intrusion were the equivalents in heritage of spuilzie in movables and the three actions are all of the same general nature.[18] Bankton[19] equates the brieve of disseisin to this action. Ejection was the unwarrantable entry into possession of lands or other heritages and the violent expulsion of the person then enjoying actual natural possession, or of his family, servants, or goods. Intrusion was similar unwarrantable entry *clam vel precario* when natural possession was temporarily void though not presumed to have been relinquished, the actual possessor

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13 *Somerville* v. *Hamilton*, 1541, Balf. 471.

14 Stair, I, 9, 16; Bankton, I, 10, 133; Ersk. III, 7, 16.

15 *Schothart* v. *Quhitehead*, 1560, Acta Curiae Admirallatus Scotiae (Stair Society), 147, 150.

16 *Cunninghame* v. *Carluke*, 1574, Balf. 320.

17 *Schaw* v. *Haitlie*, 1505, Balf. 321.

18 Bankton, I, 10, 145; Ersk. IV, 1, 15.

19 I, 10, 147. So, too, Balfour, *Practicks*, 465

holding only *animo* and not *facto*.[20] Both involved entry into natural possession or at least deprivation of a tenant and they seem regularly to have been combined in one action.[21] Again ejection was frequently combined with spuilzie.[22] As in spuilzie the actions might be brought for the recovery of possession of the subjects and for violent profits. Possession only and not title needed to be averred, unless the ejector himself produced a heritable title to the subjects. Stair [23] remarks that "one of the first principles of government is the preservation of each person in their possessions, not to be put therefrom but by their own consent, or order of law." The tenant dispossessed, or his wife and bairns, and not the landlord, was the proper pursuer and the landlord could not, without the consent of the tenant, recover violent profits, but only recovery of possession and damages such as he had himself suffered.[24] The defender had, as a condition of lodging defences, to find caution for violent profits, unless he were prepared instantly to verify a defence which excluded the action.[25] The action was first of all to prescribe in a year and a day [26] (Qy.—a relic of the *novel* element in novel disseisin?) but later the short negative prescription of three years under the Act of 1579 applied to such actions, though if the pursuer were in minority, the prescriptive period did not commence to run till he came of age.[27] Usage, however, restricted the operation of this so as to affect only the right to violent profits. After three years the right to violent profits could only be proved by the pursuer's oath *in litem*. This limitation only affected the liability for the excess of violent profits over ordinary damages, as the pursuer still had the right to sue for restitution and ordinary damages. Later statutes provided that the action was to prescribe in 10 years if

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[20] Stair, IV, 28, 1; *Hally* v. *Lang*, 1867, 5 m. 951.
[21] Hope, *Major Practicks*, VI, 15.
[22] *e.g.*, *Anderson* v. *Kinneir*, 1587, Mor. 3617; *Fraser*, 1583, *ibid.*
[23] IV, 28, 2.
[24] Stair, IV, 28, 3; *Steile* v. *Hay*, 1666, Mor. 3611.
[25] Act 1594, c. 27 (A.P.S. IV, 68), and A.S. July 10, 1839.
[26] Act 1567, c. 37 (A.P.S. III, 40).
[27] Stair, IV, 28, 7.

not wakened every five [28] or to prescribe in five years if not wakened within that time.[29]

The proper defences [30] were restoration of the ground and the relinquishing of possession within 24 hours, there being still liability for expenses and damages; or entry into possession by authority of a competent judge; or entry into possession by consent of the pursuer or others who were in lawful possession of the lands, which required more pregnant evidence than the violence alleged by the pursuer, such as delivery of keys, removal of goods or renunciation of possession subscribed by the renouncer; or prescription as already mentioned. No disposition or obligation to possess was relevant against ejection unless it bore a warrant to enter into possession summarily, but these were relevant against intrusion where the possession, though not deserted *simpliciter*, was deserted as to corporeal possession. Nor would a defence be sustained upon apprising and adjudication as the Lords had a reserved power to restrict these, nor did they contain any warrant for summary possession.

Violent profits might be sought as a distinct action or added to an action of ejection or spuilzie. They were so called [31] because they arose from violent attaining or retaining of possession and were partly persecutory, partly penal, comprehending not only the ordinary profits of a tenement but such profits as the greatest industry could procure, with no allowance for the expense of the labour. In houses, the double-mail was ordinarily sustained as violent profits, but the violent profits of other subjects were less clear. They could be claimed as arising from ejection and intrusion, succeeding in the vice, and continuing in possession after decree of removing. Stair [32] gives the tenor of a summons for violent profits. The principle is put briefly in *Bishop of Murray* v. *Earl of Errol* [33]:—"Gif ony man be convict

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[28] Act 1669, c. 14 (A.P.S. VII, 561).
[29] Act 1685, c. 14 (A.P.S. VIII, 471).
[30] Stair, IV, 28, 7.
[31] Stair, IV, 29, 2.
[32] IV, 29, 5.
[33] 1555, Balf. 466.

of masterful ejectioun, or violent occupation of ony landis, he sall not only pay the maillis and dewties quhilkis the landis gevis zeirlie be tak and assedatioun, bot alswa the proffitis quhilk the landis may give, or micht have gevin, or have been gottin of thame ony way, be him quha is ejectit, gif he had not bene ejectit and spulzeit of his possessioun."

The trio of spuilzie, ejection and intrusion were the staple of the reports down to the seventeenth century and are clearly the lineal successors of older forms of process, but in the fifteenth and sixteenth centuries a number of other forms of reparation appeared, originating partly from legislative attempts to curb crying evils in the administration of justice. The courts also came to grant remedies in circumstances where developing ideas showed the necessity. Among these newer forms were further possessory remedies such as succeeding in the vice and molestation. Succeeding in the vice was described by Stair [34] as a pendant to violent profits in his chapter on tacks as "a kind of intrusion, whereby, after warning, any person comes in possession either by consent of the parties warned [*sc.* to remove], or their fault in not offering the void possession; but if the possession be taken without the master's consent any other way, it is an ordinary intrusion. Against such there needs no warning but a summary process, as in other intrusions, having the same probation; for in both the possession must be proved, which with the warning is sufficient; but can have no effect till decreet of removing be obtained against the tenant warned." Violent profits were, as in removing, the ordinary consequence, but were not obtainable where there was a colourable title [35] but otherwise the tenant's liability was "as if he violently possessed, because, in obedience to the warning, he ought to have left the possession void and offered it to the heritor; and he who

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[34] II, 9, 45. *Cf.* Bankton, I, 10, 149.

[35] *Ord* v. *His Tenants*, 1634, Mor. 9769.

succeeds in the vice is likewise subjected as an intruder, unless he has a colourable title to protect him." [36]

Molestation was an action similar to removing concluding for damages against a defender who had troubled the pursuer in his possession, chiefly in and about the marches of his lands. It is probably still competent though obsolete, having been superseded by suspension and interdict. Stair [37] compares it with the Roman *actio finium regundorum* and says [38]: "The party injurer is obliged to refund the damage to the party injured, and the marches being cognosced, he will be decerned to desist and cease from troubling in time coming." The process by which molestation was determined was a cognition by an assize, the course of which was ordered by the Act 1587, c. 23.[39] These were of old decided by sheriffs, bailies of regality and other local judges ordinary, by the determination of an assize, or inquest of the best and worthiest in the country, who had to be, for the most part, landed men having four ploughs of land, or 300 merks of yearly rent unredeemable, and they might still be so pursued in Stair's time, though he quotes [40] a form of summons of molestation. It was chiefly competent in rural tenements though occasionally also in urban, when gardens or waste ground adjoined.

The very similar process of regulation of marches for prevention of molestation might be by brieve of perambulation from Chancery. In the former possession as well as title had to be shown. In 1587 the Lords were authorised to order molestations upon complaints made to them, and for the avoidance of this kind of dispute there arose the legislation relating to straightening march-fences and building march-dykes.

In connection with molestation the institutional writers mention lawburrows and contravention thereof as being sustained in the event of further trouble. Lawburrows is

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[36] Bankton, I, 10, 149.
[37] IV, 27, 1. *Cf.* Bankton, I, 10, 152.
[38] I, 9, 27.
[39] A.P.S. III, 445. See also Ersk. IV, 1, 48.
[40] IV, 27, 8. See also Bankton, I, 10, 50.

an ancient form of process, still extant but in disuse, by which a person who has, or thinks he has, reason to apprehend danger from another, obliges the other to find caution or security (borgh) not to trouble or molest him. In 1368 Brown of Migmar found security to keep the peace with Robert de Umfraville.[41] The old process was by brieve of peace from Chancery. Later letters of lawburrows were issued on application made to the Court of Session or Justiciary to charge the party complained of to give security that the complainer should be kept free from illegal violence, originally only bodily harm[42] but later extending to harm to the complainer's person or property.[43] If caution were not found, caption and imprisonment might follow. It must have been a common enough process for it is related that 26 books of lawburrows were returned to Scotland from the Tower of London in 1657.[44]

Contravention of lawburrows is treated by Stair[45] as another kind of reparation: "as it signifies any act done against lawburrows, so it implies the obligation of the contravenor, and the personal right, which the user of the lawburrows hath thereby and likewise the action, by which it is pursued." To prevent such delinquencies and to terrify evil-doers a greater penalty than reparation was appointed, according to the quality and estate of the injurer: half of the penalty was applied to the injured party and half to the public. The action was at the instance of the public prosecutor of the court which issued the warrant as well as of the party injured, and where the act was not sufficient to infer contravention the complainer could insist for damages in the same action.[46] The offender was also liable to prosecution for the assault or breach of the peace.[47] The

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41 A.P.S. I, 506.

42 Act 1429, c. 20, A.P.S. II, 19. There was much legislation on the subject. See 1432, A.P.S. II, 21; 1449, A.P.S. II, 35; 1457, A.P.S. II, 51; 1466, A.P.S. II, 85; 1491, A.P.S. II, 225; 1567, A.P.S. III, 41; 1579, A.P.S. III, 144; 1581, A.P.S. III, 222.

43 Act 1587, c. 117 (A.P.S. III, 222).

44 A.P.S. I, 129.

45 I, 9, 30.

46 Bankton, I, 10, 286; *Wemyss* v. *Stuart*, 1633, Mor. 8037.

47 *King* v. *Crichton*, 1517, Mor. 8023.

action of contravention might proceed on any delinquence according to the tenor of the act of caution or letters of lawburrows and it was unnecessary to prove any damage accruing in consequence of the contravention.[48]

If the pledge were broken the cautioner was liable to a fine, and he had in consequence to be a person of substance : there are instances of refusal of a cautioner because he " wes noucht landit man " [49] and if called on he had an action for relief against the principal.[50]

It is interesting to note that as late as 1874 [51] Lord Mackenzie admitted that the law regarding letters of lawburrows was not in desuetude but "*in viridi observantia*, for many letters of lawburrows pass the signet and are carried out every year and almost every month."

Battery *pendente lite* was a kind of lawburrows apparently originating in Acts of 1584 and 1594 to the effect that a party to a cause killing or injuring his opponent should lose his action.[52]

Breach of arrestment and deforcement [53] are both violations of legal acts and the Act 1581, c. 23 [54] provided that breakers of arrestment or deforcers of poinding should escheat their whole movables as well as their persons and the injured party should be first paid of his debt and damages with a further sum, modified at the Lords' discretion in name of damage and interest, but no action lay for breach of arrestment *ultra valorem*.[55] Apparent deforcers could be summoned criminally or civilly [56] though the criminal action was rare by the later nineteenth century.[57] The Act 1592, c. 72 [58] gave the injured party half of the escheat of the movables.

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[48] Bankton, I, 10, 285.
[49] Sheriff Court Book of Fife (S.H.S.) 189.
[50] A.P.S. II, 225.
[51] *Brock* v. *Rankine*, 1 R. 991, at 996.
[52] Bankton, I, 10, 179.
[53] Stair, I, 9, 29; Bankton, I, 10, 190. Deforcement was forcible prevention of an officer of law from executing a legal warrant of a court.
[54] A.P.S. III, 223.
[55] *Grant* v. *Hill*, 1792, Mor. 786.
[56] Act 1587, c. 57; A.P.S. III, 460a.
[57] Nicolson's *Erskine*, note to III, 6, 14.
[58] A.P.S. III, 577.

Fraud appears at least as early as 1501, when there was an action of improbation on the ground of fraud and circumvention.[59] It is under the name of circumvention that Stair treats of fraud "whereby a person is induced to a deed or obligation by deceit."[60] After explaining that error or mistake is not enough, but "if the error or mistake, which gave the cause to the contract, were by the machination, project or endeavour of any other party than the party errant, it would be circumvention." For remedies Stair refers to the praetorian edict *de dolo malo* whereby reparation was given to the injured by the estimation of the party injured by his oath *in litem*, and also to the *actio redhibitoria et quanti minoris* whereby the deceived might obtain what damage they had sustained by the fraud or annul the bargain. Scots law, Stair said, had followed the civil law because it was most equitable and expedient. Simulation, particularly in gifts of escheat and liferent, and collusion in completing diligences fell also to be treated under fraud. Reparation of fraud was by annulling of the contract or by making up the damage sustained by the fraud at the option of the injured party.

Fraud engaged the attention of Parliament much from 1540 onwards. There were Acts for preventing and punishing fraud in alienations, provisions for the reduction of infeftments on the ground of fraud, for the reduction of alienations in defraud of creditors, and the still extant provisions of 1621 and 1696 against alienations and fraudulent preferences in bankruptcy.

Assythment was mentioned last at the stage of the primitive *cro* and compensation tariff. From this seems to have developed the assythment which was known throughout the early modern period. Bankton[61] expressly derives assythment from *cro* and the Saxon *wergild*. The outstanding indicia of this remedy were that where death was caused but the panel was not put to death, on account of conviction

[59] *The King* v. *Hering*, A.D.C. III, 36.
[60] I, 9, 9. *Cf.* Bankton, I, 10, 62 *et seq.*
[61] I, 10, 15.

of culpable homicide only, or royal pardon, or Act of Indemnity, he became liable in a sum of money to the widow and children or next-of-kin of the deceased.[62] No remission or pardon was to have effect unless it bore that satisfaction had been made to the kindred and letters of slains obtained from them, though later he might be released on finding caution for assythment. Hume [63] cites several cases showing that this was the course down to the eighteenth century and the reports bear him out. In the fifteenth and sixteenth centuries legislation preserves the relatives' right to have their assythment and grant letters of slains before royal pardon should be effective.[64] If the sentence on the panel were reversed *ex justitia* assythment was extinguished.

Assythment also applied to injuries short of death, and hence it was the civil remedy for assault [65] and rape. Bankton [66] says it is "the satisfaction due to the person wounded or maimed, or in case he is killed, to his wife or nearest relations." It is interesting that Bankton's description [67] of what reparation is included in assythment for non-fatal injuries corresponds broadly to the modern measure of damages for personal injuries.

With the early sixteenth century we have a better opportunity of seeing the law of reparation in practice. The Acta Dominorum Concilii, The Acta Dominorum Concilii et Sessionis and Balfour's Practicks all tell broadly the same story. Spuilzie is by far the commonest cause of all. It is found relating to every conceivable kind of movable property, oats, cattle and horses, sheep, boxes of jewels, money, charters, clothing, bedding, corn, timber, boards, stones and slates, steelbow goods, evidents, and goods and gear generally. Decrees are generally for restitution sometimes with damages for the loss. Whether the decrees were enforced or enforceable is, however, another matter. There

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62 Hume, I, 284; Kames, *Historical Law Tracts*, 64.
63 I, 285–6.
64 Hume, II, 496 *et seq.*, Bankton, I, 10, 16.
65 See examples in *Justiciary Records of Argyll* (Stair Society), I, pp. 64, 98, 113, and Bankton, I, 10, 35.
66 I, 10, 14.
67 I, 10, 19.

are numerous cases too of wrongous intromission, particularly with teinds and maills and profits or duties.

Ejection and intrusion likewise repeatedly appears, arising frequently out of wadsets and assedations, the remedy frequently being by interdict and damages for the loss sustained. Frequently it is conjoined with spuilzie. Molestation appears in quite a number of cases, perambulations being sometimes ordered, as does contravention of lawburrows. It will be seen then that the possessory remedies were very important and commonly resorted to, the purpose being to regulate possession pending the determination of any question of title. The constant struggle was to prevent title being decided by the right of the stronger.

Other kinds of delinquency are found in these reports, assault sometimes with robbery, detention of a person, defamation, reduction of deeds granted through force and fear, breach of arrestment and deforcement, restoration in integrum against frauds and deception, assythment for various assaults and injuries. One important characteristic of Scottish procedure is very evident, that there are no rigid forms of actions but a practically universally applicable form of initial writ, so that a person complaining of a wrong is never debarred from seeking a remedy. It is apparent too that as compared with modern practice wilful wrongs are much more in evidence than wrongs of negligence, that concept being nowhere clearly visible. Also wrongs to property occupy a far larger sphere than in modern law, where reparation relates very largely to injuries to personal health, liberty or reputation.

The seventeenth century shows little change; such authorities as Hope's Major Practicks and Durie's Reports mention the same topics. Hope, for example, mentions ejection and intrusion,[68] spuilzie and wrongous intromission,[69] violent profits,[70] perambulation,[71] improbation,[72]

[68] VI, 15.
[69] VI, 18.
[70] VI, 19.
[71] VI, 21.
[72] VI, 24.

reduction,[73] deforcement,[74] contravention of lawburrows,[75] breach of arrestment,[76] damage and interest,[77] and assythment.[78] It seems then that by this time the scope of reparation had become fairly well settled and the main subjects recognised before Stair wrote. There have, of course, been substantial later developments, some of which were only to be expected. In earlier times defamation was not likely to have appeared much as a topic of law. In days when men commonly carried swords and pistols, slander was more likely to appear in court in the guise of wounding and assythment. Apart from *Hill* v. *Sim* in 1611 [79] it seems to belong exclusively to the eighteenth century and after. Similarly civil actions for fraud presuppose a rather higher level of civilisation, greater reliance on written titles and deeds and a more law-abiding temperament than had been general in times earlier than the seventeenth century. The most conspicuously anomalous case is assythment. In the sixteenth and seventeenth centuries there was still liability for assythment independently of fault; the distinction between culpable and negligent homicide was not drawn. Thus the Acts of 1649 [80] and 1661 [81] provided that homicide by accident or in self-defence were not to be capital, but they were still punishable by assythment or imprisonment. The remarkable case of *Drew* v. *Horne* [82] in 1611 bears that "a man being hurt and wounded taking satisfaction and *granting that it proceeded of his own default* and therefore granting him fully assythed by them; if thereafter he die of these wounds . . . his assythment will not relieve him [*i.e.*, the assailant] and . . . he must assyth the defunct's nearest kinsman." It was only in the eighteenth century that accidental homicide ceased to be criminal and therefore

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[73] VI, 25.
[74] VI, 31.
[75] VI, 35.
[76] VI, 37.
[77] VI, 40.
[78] VIII, 13.
[79] Mor. 13921.
[80] A.P.S. VI (ii) 173.
[81] A.P.S. VII, 203.
[82] Mor. 13904.

assythable.[83] In 1757 [84] assythment for accidental [85] homicide was still maintained as a right.

The latter years of the seventeenth century are an important stage in this examination because life in the country was becoming law-abiding, the courts were exercising greater influence and the doctrines of law were becoming more settled. Furthermore, and of great importance from the point of view of a theoretical examination of reparation, Stair's Institutions appeared, to consider reparation as a whole and put these doctrines in their due place in a system of law reduced for the first time to a comprehensive and arranged form. It is therefore necessary to look more closely at Stair's account of reparation, which forms a convenient link between the uncertainty of earlier law and the more clearly distinguishable changes of later development.

Stair deals with reparation in Book I, Title 9, and it is noteworthy that here for the first time we meet the general term reparation. The individual wrongs Stair calls not delicts but delinquences, and in this nomenclature he is followed by Erskine.[86] The term delict was not adopted till Bell's Principles drew the distinction between delict and quasi-delict. Stair discusses reparation generally, as an obediential obligation, arising without convention, consent, or contract, to make reparation, existing by the law of nature. Then [87] he distinguishes punishment for a delinquence relating to God from the obligation of reparation due to man of repairing of damage by putting him in as good a condition as he was in before the injury, and then, having set aside criminal wrongs, he comes to consider civil delinquences. These he classifies [88] as (i) damage to life, members and health, (ii) restraint and constraint on liberty, (iii) injury to fame, reputation and honour, (iv) content,

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[83] Ersk. IV, 4, 5; Hume, I, 194.
[84] *Malloch* v. *Fultons*, Mor. 11774.
[85] This appears from the narrative of the criminal proceedings in Maclaurin at p. 123.
[86] III, 1, 12.
[87] I, 9, 2.
[88] I, 9, 4.

delight and satisfaction, and especially by the singular affection to, or opinion of, the value or worth of anything that the owner hath, and (v) damage in goods and possessions. Reparation falls to be made " by restitution of the same thing in the same case, that it would have been in, if it had remained with the owner, and this is most exact; or where that cannot be, by giving the like value, or that which may come nearest to make up the damage, according to the desire of the damnified. And if none be found fitter, reparation must be made in money, which is the common token of exchange and hath in it the value of every thing estimable." [89]

Then [90] Stair comes to the individual delinquences either innominate, pursued under the general head of damage and interest, or individual and nominate wrongs. Among these he lists (i) assythment, the obligation to repair damages sustained by slaughter, mutilation or other injuries to body or health, chiefly pursued by the wife, children or next-of-kin, or competent to the party hurt or prejudiced.[91] Then there is (ii) extortion by force or fear whereby a person is compelled to do that which of his proper inclination, he would not have done: in this our customs follow the civil law.[92] Next he mentions (iii) circumvention, the act of fraud, whereby a person is induced to a deed or obligation by deceit, called *dolus malus*.[93] Under fraud, simulation and collusion are comprehended and there is a long discourse on frauds in bankruptcy.[94]

After this Stair treats of (iv) spuilzie and the defences thereto,[95] and (v) ejection and intrusion,[96] violent profits and succeeding in the vice, and then (vi) of molestation. The next delinquences are (vii) breach of arrestment and deforcement, which are, in all things, equiparate,[97] and (viii) contravention of lawburrows.

Further information may be gleaned from Book IV,

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[89] I, 9, 4 *ad fin.*
[90] I, 9, 6.
[91] I, 9, 7.
[92] I, 9, 8.
[93] I, 9, 9.
[94] I, 9, 12 *et seq.*
[95] I, 9, 16.
[96] I, 9, 25.
[97] I, 9, 29.

where Stair comes to treat of Actions. There he devotes titles to molestation,[98] ejection and intrusion,[99] violent profits,[1] spuilzie and wrongous intromission.[2] All these are possessory and follow on his discussion of removing in IV, 26. Apart from these titles reductions and improbations would cover some cases of fraud, while petitory actions [3] arise for "damage by delinquence, by extortion, circumvention, simulation, collusion." Such is Stair's comprehension of reparation in outline. Defamation is a notable absentee while such wrongs as adultery, rape, seduction and assault have apparently not yet made the transition from being criminal to civil pleas. It is also noteworthy that there is no recognition of liability for negligence though Mackenzie [4] distinguished it from wilful wrongdoing, a distinction which Erskine [5] made clear.

It is interesting to follow up Stair's discussion of actions by looking at Dallas's Styles (1697). He quotes summonses of ejection and intrusion, including damage; ejection, intrusion and spuilziation; spuilzie; recent spuilzie, and wrongous intromission.[6]

Bankton [7] sought to deal only with deliquences cognoscible in civil courts: he defines crime as an unlawful act that merits punishment, from which an obligation arises "undoubtedly founded in nature, because, by the dictates of reason, the offender must suffer the punishment due to the public and repair the damage to the party aggrieved." The delinquences civilly cognoscible are listed [8] as assythment, injury, damage, extortion by force or fear, circumvention and fraud, spuilie [*sic*], intrusion, ejection, molestation and perambulation, contravention of lawburrows, battery *pendente lite*, breach of arrestment, deforcement, escape

[98] IV, 27.
[99] IV, 28.
[1] IV, 29.
[2] IV, 30.
[3] IV, 21.
[4] Works, II, 309.
[5] III, 1, 13.
[6] pp. 202 *et seq.*
[7] I, 10.
[8] I, 10, 13 *et seq.*

of a prisoner, excessive and deceitful gaming, forgery of writings, and perjuries. Of these injury is hurt to one's fame and reputation, by facts as by assault and battery; by words, reproachful and slanderous, or verbal injury; by consent, in giving authority to commit the injury; or by writing, such as libel. Damage is particularly the loss which arises from diminishing, spoiling or destroying one's goods. Excessive and deceitful gaming is mentioned by no other writer as a subject for reparation and is almost certainly obsolete.

Some other wrongs seem to have appeared in the eighteenth century. An early instance of seduction was *Gairdin* v. *Lammye* [9] where the claim was based on the fact that he *seduxit defloravit et dormivit cum* the pursuer but later cases were based on the concept of fraud—"fraudulently abusing her," [10] "*stuprum fraudulentum*," [11] "the Lords declared they would allow damages against the man who had *dolose* induced a party to trust him." [12] Adultery goes back to about 1743 where it was held relevant in *Steedman* v. *Coupar* [13] though the ground of damages seems rather to have been the loss to the pursuer's business. It was again held competent in *Maxwell* v. *Montgomery*.[14] Breach of promise appeared in *Thomson* v. *Wright* [15] (at the instance of the man!) and pursued by the woman in *Johnston* v. *Pasley* [16] where the judges were "clear, that no action could be sustained in this country for the breach of a simple promise, unless something had intervened, such as bespeaking clothes, etc., in expectation of the marriage" and allowed a proof. The eighteenth century also saw a wide extension of defamation and verbal injury [17] and some new variants such as wrongous imprisonment.[18]

Before leaving the eighteenth century it is necessary to

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[9] 1543, Fraser on *Husband and Wife*, I, 501, note.
[10] *Clerk* v. *Fairweather*, 1727, Hermand's *Consistorial Decisions* (Stair Society), 68.
[11] *Linning* v. *Hamilton*, 1748, Mor. 13909; *Buchanan* v. *MacNab*, 1785, Mor. 13918.
[12] *Hislop* v. *Ker*, 1696, Mor. 13908.
[13] Mor. 13909.
[14] 1787, Mor. 13919.
[15] 1767, Mor. 13915.
[16] 1770, Mor. 13916.
[17] Cases in Morison 13922–13942.
[18] *Bell* v. *Maxwell*, 1743, Mor. 13951.

look at Erskine, who treats of reparation at Book III, Title I, Section 13. He lays down, again, be it noted, under the general head of obligations arising from delinquency that everyone "who can distinguish between right and wrong is naturally [*i.e.*, by the law of nature] obliged to make up the damage befalling his neighbour [19] from a wrong committed by himself. Wherefore every fraudulent contrivance or unwarrantable act by which another suffers damage, or runs the hazard of it, subjects the delinquent to reparation . . . Wrong may arise not only from positive acts of trespass or injury, but from blameable omission or neglect of duty."

Erskine does not give a precise enumeration of the heads of reparation recognised by him and this has to be culled from his titles on various actions. He divides actions [20] into persecutorial and penal, in the first of which categories damages is included. "In penal actions the pursuer insists, not only for restitution and real damages, but for extraordinary damages, or reparation, by way of penalty." Spuilzie, ejection and intrusion are penal when they include violent profits. So is contravention of lawburrows. Then he treats of reductions on the head of force and fear, or of fraud and circumvention, and reductions of deeds granted to the prejudice of creditors. After treating of spuilzie, ejection and intrusion and molestation, he comes to treat of crimes which are "generally divided into crimes properly so-called and delicts. Delicts are commonly understood of slighter offences, which do not affect the public peace so immediately, and therefore may be punished by a small pecuniary fine, or by a short imprisonment, as petty riots, injuries, offences against inferior jurisdictions, etc." This is a somewhat peculiar use of the term delict corresponding neither to the Roman nor to the later Scottish usage, as in Bell. Wrongous imprisonment Erskine treats of as a crime, and so too deforcement and breach of arrestment, though he admits they are both civil and criminal. Adultery and rape are

[19] *Cf. Donoghue* v. *Stevenson*, 1932 S.C.(H.L.) 31, *per* Lord Atkin at p. 44.
[20] IV, I, 14.

both criminal, as the latter still is, as well as being a civil wrong. Then he mentions verbal injuries and " where injurious reflections are frequently repeated in private companies, or bandied about in whispers to confidents, the offence grows up to the crime of slander and defamation . . ." Assythment is only mentioned as pendant to punishment which tends to indicate that it was on the decline. Otherwise the most notable feature of Erskine is his division of civil and criminal wrongs which clearly belongs to the older rather than the more modern ideas.

The nineteenth century and later has been a period of great development and it is in it that the law of reparation has come to take the form we know at present. In the first place the cleavage of civil and criminal has become more distinct. Secondly, the distinction of wilful or malicious and negligent wrongs has been clearly recognised. Bell's Principles [21] divides the rights every man has to enjoyment of his personal safety, liberty, and good fortune into two classes—(1) a direct violation of a right, called delict, defined as " an offence committed with a fraudulent malicious or criminal purpose : and the counterpart in civil jurisprudence is an obligation by construction of law to repair the damage thereby occasioned," [22] and (2) indirect violation of right, by negligence, so gross as to be analogous to crime, called quasi-delict.[23] Thirdly, the progress of invention and industrialisation coupled with changing social ideals and greater respect for law and order and the rights of others radically altered the preponderance of wilful and negligent wrongs, so that cases of wrongs of negligence came greatly to outnumber wrongs of malice.

It follows from this that the older types of actions very largely disappeared. In the sphere of personal injuries assythment was really obsolete by 1800. In the absence of crime, it could have no application and injuries or death resulting from what was recognised as non-criminal negligence were becoming commoner as time went on with faster

[21] 1st ed., 1829, p. 139.
[22] See now 10th ed., 1899, § 544.
[23] See now 10th ed., 1899, § 553.

vehicles, power-driven machinery and railways. So the *actio injuriarum* took its rise at the beginning of the century, in *Innes* v. *Magistrates of Edinburgh* [24] and *Black* v. *Cadell* [25] which was a bold departure, proceeding simply on principle and quasi-delict and casting aside older forms. Assythment, however, continued to be mentioned in these and other cases down to the middle of the century. There was a distinct tendency to confuse [26] or equiparate [27] the two remedies, and assythment had still to be distinguished as a thing apart in the leading case on the modern remedy [28] but the historical connection was recognised in *Greenhorn* v. *Addie* [29] where Lord Deas said there were "strong grounds for contending that [the *actio injuriarum* has] sprung very much out of or been engrafted on the old law of assythment, or the principles on which that law was founded."

Later nineteenth century judges probably went too far in saying that the *actio injuriarum* did not partake in any degree of the nature of assythment [30] or that there was no analogy between the two.[31] Lord Dunedin, however, recognised [32] that at least the idea of solatium is derived from assythment.

The *actio injuriarum* thereafter proceeded from strength to strength during the century and claims for personal injuries arising from negligence enormously multiplied. It would, however, go beyond the scope of this paper to consider the complications engrafted on this basis by contributory negligence, the doctrine of common employment, the Employers' Liability Act, the Workmen's Compensation Acts, vicarious liability and so on. Similarly successive

[24] 1798, Mor. 13189.

[25] 1804, Mor. 13905; 1812, 5 Paton 567.

[26] *Stewart* v. *Earl of Fife*, 1768, 1 Hailes 206, 209; *Brown* v. *MacGregor*, February 26, 1813, F.C.; *Cooley* v. *Edinburgh and Glasgow Ry.* (1845) 8 D. 288 (where there had also been criminal proceedings, *sub nom. H.M. Advocate* v. *Paton and McNab*, 1845, 2 Broun, 525).

[27] *Baird* v. *Hamilton* (1826) 4 S. 790, 792.

[28] *Eisten* v. *N.B. Ry.* (1870) 8 M. 980.

[29] (1855) 17 D. 860, 862.

[30] *Eisten* v. *N.B. Ry.* (1870) 8 M. 980, 983, *per* L. P. Inglis.

[31] *Darling* v. *Gray* (1892) 19 R.(H.L.) 31, 32, *per* Lord Watson.

[32] *Black* v. *N. B. Ry.*, 1908 S.C. 444, 453; *Davidson* v. *Sprengel*, 1909 S.C. 566, 570.

Factory Acts and the like have introduced many statutory grounds of negligence while the development of railway, then road, and now air transport have multiplied the possible quasi-delicts.

The establishment of the Jury Court in 1815 gave greater prominence to some forms of reparation such as assault and defamation but new forms of wrong continued to appear. Wrongful detention in an asylum seems to have appeared first in 1825.[33] Statute was, of course, responsible for the invention of technical wrongs such as infringement of copyrights and trade marks. Moreover, the period since 1800 strikingly illustrates the readiness of Scots law to allow reparation for new and innominate wrongs which are not amenable to any classification, unless in the general category of " damage and interest."

Of the other older wrongs spuilzie faded out in the early part of the nineteenth century though it still remains a competent process and has certain distinct advantages. The last actual case was *Stove* v. *Colvin* [34] though the topic has been mentioned subsequently [35] and some later cases really depend on the same principle.[36] Many of the matters which formerly grounded actions of spuilzie would now be criminally prosecuted as theft, reset or robbery, while the more technical spuilzies would fall under wrongful use of diligence. Molestation and perambulation seem rather to have vanished *eo nomine* though the substance of the action still appears in the form of proceedings for suspension and interdicts, or possibly for trespass. Similarly, ejection and intrusion have given way to summary ejections and interdicts. Fraud remains of importance. Deforcement is still a crime but is uncommon and there seem to be no modern instances of it as a civil cause.

The law of reparation has therefore developed not in any direct or easily traced line of descent but in a way which

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[33] *Dickie* v. *Dickie*, 1825, 3 Mur. 509; followed by *McCosh* v. *McCosh* (1832) 10 S. 579.
[34] (1831) 9 S. 633.
[35] *Baillie* v. *Young* (1835) 13 S. 472.
[36] *Lockhart* v. *Cunninghame* (1871) 8 S.L.R. 151; *Mackintosh* v. *Galbraith* (1900) 3 F. 66.

requires much further investigation. Every individual type of wrong has a distinct history which requires independent study, and the rapid changes since 1800 themselves give scope for study which would doubtless go far to clarify the interrelations of the various types of actions. To do so here would, however, inordinately extend this paper and must await another occasion.

David M. Walker.

SOVEREIGNTY IN THEORY AND PRACTICE

IT is customary to apologise for choosing such a well-known theme as that of sovereignty to discuss. But excuses would only be called for if general agreement had by now been reached on the subject, or alternatively if it had lost its importance. It is very clear that neither supposition is true of the conception of sovereignty. As an eminent international lawyer has recently said, " Sovereignty has become the central problem in the study both of the nature of the modern State and of the theory of international law." [1] It is therefore not superfluous to inquire once again what the term really means, or at least whether any consistent and useful meaning can be attached to it. It has been so much encrusted with superstition and prejudice in the course of the last 400 years that some people would discard it altogether. Thus Sir Ivor Jennings prefers to talk of the " supremacy " rather than the " sovereignty " of Parliament, because the former word is not " associated with politico-theological dogmas." But the difficulties cannot be avoided by using a synonym, and attempts to show that the conception of sovereignty is itself otiose or worthless can hardly be called very successful. One thing is certain, that sovereignty is an unpopular idea nowadays, and writers on international affairs in particular may be counted on to speak of it severely. The argument of the following pages is that sovereignty can be given a definite meaning, and that, both within the State and in a society of States, it is an indispensable conception.

There are two essential points in the argument. The first is that, while it belongs to the field of politics, sovereignty is properly, and can only be, a legal conception. That is to say, it is a matter of political authority and not of political power. The point is not new, but it is necessary

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[1] J. L. Brierly, *The Law of Nations*, 4th ed. (1949), p. 7.

to make it at the start because confusion between *de jure* and *de facto* supremacy has done, and still does, more to obscure thought on the subject than anything else. Probably it results in part from the fact that the word " power " is used in a double sense, sometimes to denote the physical and moral force at the disposal of a government to make its will obeyed, and sometimes to denote the right of a government to exercise that force, as when it is said that a Minister has or has not the power under an Act of Parliament to make a certain Order.[2] Any discussion of sovereignty that does not distinguish between " power " in the former and " power " in the latter sense is just a waste of time. Everybody, of course, is free to use words as he pleases, so long as he uses them consistently in one sense or another. Sovereignty may be taken to mean supreme power (or force) and not supreme authority. The trouble with those who, like Hobbes and Austin, write of sovereignty as if it were equivalent to supreme power is that they fail to identify it completely with *de facto* supremacy. They maintain that authority is a creation of power, that right rests on might, but it is a theory of authority which they are asserting all the same, not a theory of power. A true theory of power would seek to explain not political obligation but political obedience, and questions of law would be irrelevant to it except in so far as they may be a psychological factor influencing human behaviour.

The distinction between political authority and political power is necessary because in any political community the person or persons who are invested with the right to exercise power may be, and often are, different from those who in fact mainly exercise it. It is trite constitutional doctrine in this country that Parliament is sovereign, but we all know that the country is not ruled by Parliament. On the other

[2] There is a similar ambiguity in the Latin word " *potestas*," which, as McIlwain points out in his *Constitutionalism and the Changing World*, pp. 26 *et seq.*, may mean either *auctoritas* or *potentia*. He has no doubt that it was the former meaning that Bodin had in view in his famous definition of sovereignty as *summa in cives ac subditos legibusque soluta potestas*.

hand, there is a close and subtle connection between authority and power. As Bryce remarked, they tend to coalesce, since in time *de facto* supremacy ripens into *de jure* supremacy, while the latter also attracts to itself the former.[3] It is as inconceivable, in a constitutional State, that the *de jure* government should have no actual power at all as that the *de facto* government should have no legal authority at all. The contrast between the paramount authority of Parliament and its inferiority in actual power, which is so impressive a feature of the British system of government, is less obvious even in some other parliamentary countries. In France, for example, the National Assembly has a much larger share of real power. It is, however, perhaps safe to say that political and legal supremacy nearly always fail to some extent to coincide exactly.

The practical difficulty of accepting the doctrine of the absolute legislative supremacy of Parliament led Dicey to distinguish between the legal and the political sovereign. "But the word 'sovereignty' is sometimes employed in a political rather than in a strictly legal sense. That body is politically sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the State. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and Lords, or, perhaps, in strict accuracy independently of the King and the Peers, the body in which sovereign power is vested."[4] It would surely be more appropriate, if different kinds of sovereignty are to be classified, to make a three-fold division into (1) practical sovereignty, which belongs in this country to the Government, or the Cabinet; (2) legal sovereignty, which is possessed by Parliament; and (3) ultimate political sovereignty, which resides in the electorate. But, on the assumption that sovereignty means supreme authority and not supreme power, any classification of different sorts of sovereignty is altogether inaccurate and inept. Indeed, Dicey's cautious choice of language indicates that he

[3] James Bryce, *Studies in History and Jurisprudence*, vol. II, pp. 64–65.
[4] *Law of the Constitution*, 9th ed., p. 73.

employs the term " political sovereign " in a loose sense. There can only be one kind of sovereign, the legal ruler, if the word " sovereignty " is to have precise significance, and the fact that he may in practice be subject to the will of another person does not make that person a sovereign. The much-quoted saying of Gray that the real rulers of a society are undiscoverable is an exaggeration, but political supremacy is difficult to define and locate, and if it means that in every State there is necessarily some person or persons whose will prevails in the end it would seem often to be non-existent. If we try to pin it down we arrive at some surprising consequences. Most absolute monarchs have allowed themselves to be dominated by a minister or a mistress. . But it would be odd to speak of Louis XV as the legal sovereign of France and Madame de Pompadour as the political sovereign. No doubt the verdict of the British electorate, as expressed by the result of a general election, will always be accepted by the citizens as final. That is not at all the same thing as to say that ultimately they obey the will of the electorate. Can the electorate be said to have a will, because every three or four years the electors in 600 constituencies have the right to choose between two or three candidates put forward by opposing political parties? It is frequently the case that the party with a majority in Parliament obtained the votes of a minority of the electorate, and even of the electors who actually voted. Do the citizens then obey the will of the electorate? In any event, does it make sense to say that the citizens, who are the electors, obey their own will?

Dicey's distinction between the legal and the political sovereign is, moreover, unhappy because it tends to imply that Parliamentary sovereignty is nothing but a legal conception. This is a complaint that may be made more fairly against other writers, perhaps, than against Dicey himself. If Parliament is the legal sovereign and the electors the political sovereign, says Sir Ivor Jennings, then " legal sovereignty is not sovereignty at all. It is not supreme power. It is a legal concept, a form of expression which

lawyers use to express the relations between Parliament and the Courts." [5] Again, according to Professor E. C. S. Wade, legal sovereignty is " merely a lawyer's rule which is accepted and acted upon because it suits political conditions in a State that the unrestricted power of law-making should rest in Parliament alone." [6]

Is the sovereignty of Parliament really a mere lawyer's rule? No doubt it is normally the case that, as Jennings says, the Government governs, " and the function of Parliament is first to register its decisions, secondly to serve as an outlet for individual and collective grievances, and thirdly to warn a Government when it is becoming unpopular." [7] But this is only half the truth. In a sense Parliament may be compared to an absolute monarch who has given his whole confidence to a powerful minister, a Wolsey or a Richelieu. The minister governs the country, but he does so on sufferance. His power, and his head, depend on the goodwill of the monarch, and he may lose them both at any time. However blunt of speech, he would scarcely be so bold as to tell his master that the royal supremacy was a lawyer's rule. Parliament is, of course, supreme in a rather different fashion from an absolute monarch. Yet it has a much more than merely nominal power to assert its legal authority. Although the Government as a rule controls Parliament, it is at the same time the creature of Parliament and can be overthrown just as suddenly and completely as a favourite who has lost his master's confidence. Only occasionally do heads roll, like those of Asquith in 1916, or Chamberlain in 1940, or the Labour ministers in 1931. But the latent power of life and death which Parliament possesses is something that must always be reckoned with, and its legal authority has therefore in practice a political significance far beyond the modest part which Jennings assigns to it.

There are various reasons why Parliament usually behaves with such docility. One of them, and it is a salient difference

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[5] *The Law and the Constitution*, 3rd ed. (1943), pp. 139–140.
[6] Dicey, *Law of the Constitution*, 9th ed. (1948), introduction, p. xli.
[7] *Op. cit.*, p. 169.

from the position of some other legislatures, is that, while it can always throw out the Government, the Government can also throw it out at any time. This in turn depends on a more fundamental reason, namely that Parliament as such does not exist. The word "Parliament" is merely a convenient way of describing the Queen in her legislative capacity, the House of Lords and the House of Commons. If we say that Parliament can do anything but turn a man into a woman, we are asserting in hyperbolical form that the three parts of the legislature, acting together, have supreme and complete political authority. But if we speak of Parliament as if it were a single body, possessing a collective will and capable of making collective decisions, we speak quite nonsensically. How can it be a single body when the three parts of the legislature function independently of one another, have no common organs and never even meet except on ceremonial occasions? A sovereign consisting of the "tripartite body" of the Queen, the Lords and the House of Commons, to use Austin's expression, is strictly a chimera. And a sovereign made up of the Queen, the Lords and the electors (a notion which he thought more accurate) is an even greater monstrosity.

If it is borne in mind that Parliament only exists in name, it is easier to see how it can be dominated by the Government. The House of Commons, were it the sole sovereign, would be a more formidable body than as one of three authorities which share sovereignty. By using the legal powers of the two Houses to supplant the monarch as head of the executive, and by using the legal powers of the monarch, in particular the royal prerogative of dissolution, to keep the two Houses in check, the Government, or rather the Cabinet, has come to be *de facto* ruler of the country, between general elections and on condition that it commands the support of a majority of the House of Commons. Parliament of course could do away with the prerogative of dissolution. But the House of Commons could not, nor could the two Houses together.

Whether it is a question of political authority, or political

power, the person or persons possessing it are creatures of flesh and blood, a Queen, a House of Lords and a House of Commons, not a " Crown " and a " Parliament." If it is a numerous body, the members are so organised as to be capable of acting in a corporate capacity. When he defined a sovereign as " a determinate human superior," receiving habitual obedience from the bulk of a given society and not in the habit of obedience to a like superior, Austin recognised that it must always be possible to point to an organised group of persons where the sovereign is not an individual. His tripartite monster was an attempt to square his definition of sovereignty with the accepted doctrine of Parliamentary supremacy. It has often been pointed out that no sovereign in the Austinian sense can be discovered in a federal State. But if he had analysed the idea of Parliamentary supremacy he would have seen that Parliament cannot be " a determinate human superior," because it is incapable of corporate action, and therefore that his belief in the indivisibility of sovereignty could not be justified. Indeed, unless sovereignty is concentrated in a single person, it must be divided, for an organised body is not really itself capable of possessing sovereignty. It is a contrivance which a number of persons invent when they wish to act effectively together. They, and they alone, are the " determinate human superiors."

The second essential point then which the present argument is concerned to make is that sovereignty can only be vested in an individual or jointly in a number of individuals. An abstraction like Parliament cannot be sovereign, any more than an abstraction can issue, or obey, an order. Sovereignty is a legal conception, but it has to do with human beings, not with phantoms. Since absolute monarchs are not to be found nowadays, at any rate in civilised States, it is no use looking for a single sovereign. All that can be discovered is certain persons who, individually or in groups, have a share of sovereignty. Sovereignty has been put into commission. But it is not the less a reality because of that.

The idea of a division of sovereignty has often presented difficulty because at first sight there seems to be something

illogical in two persons, or two independent bodies, sharing supreme authority in the same State. Neither being then supreme over the other, is it not necessary that there should be some third person or persons with the ultimate right to determine the limits of their respective jurisdictions, to keep them within their limits, and to alter the limits when required? Now it is arguable that government is likely to be more efficient where supreme authority is concentrated rather than diffused. But a division of supreme authority, or of supreme power, has nothing anomalous about it. It implies, no doubt, agreement between the persons who share in it, but there is no need for outside intervention. In practice there are always certain rules, whether legal rules or conventional rules, for keeping the joint sovereigns in their place and thus for ensuring that government does not break down through their failure to agree. They are therefore, it may be said, subject to those rules. But this is merely a verbal objection. The fact that the exercise of authority is subject to rules, whether rules of law or of another kind, does not prevent the persons who possess that authority from being sovereign. Subjection to a rule has little in common, except verbally, with subjection to another human being. The former means that sovereignty is limited, the latter would mean that it is controlled.[8] The test of sovereignty is not freedom from legal limitation, but freedom from legal subjection to the will of, and thus legal control by, some other person or persons. This is a corollary of the proposition that sovereignty can only be vested in an individual or an organised body. If there is nobody of flesh and blood to whom the ruler in a State is legally subordinate, then of necessity he must be a sovereign ruler.

It may be conceded that the word "sovereignty" is here used in a different sense from that sometimes given

[8] Bracton's maxim, *Rex non debet esse sub homine, sed sub Deo et lege*, "seems to indicate that the medieval king was an autocrat, was absolute in the sense of having no superior, but was anything but despotic, in that his *jura regalia* left off where the rights of his subjects began. He was in fact limited but not controlled." McIlwain, *op. cit.* p. 24.

to it. A ruler who is subject to law, although not subordinate to any other person, whether within the State or outside the State, is not sovereign, if by "sovereign" is meant one who possesses unlimited and illimitable authority. The question is, whether authority of that description ever really exists, or whether it is not a fiction invented to serve as a justification for political institutions. It is a human instinct to insist on finding a basis for political authority. Men are not content to see it hanging in the air. A myth is needed, and is supplied by Queen, Lords and Commons, or the people as a whole, conceived of as an ideal entity possessing ultimate authority beyond the reach not only of any human rival but of any man-made law as well. The classic expression of the myth was in the French constitution of 1791, which declared that "sovereignty is one and indivisible, inalienable and imprescriptible. It belongs to the nation." The myth still persists, although the eloquent phrases of 1791 are somewhat toned down in the constitution of the Fourth French Republic. In fact, however, supreme authority belongs exclusively, or almost exclusively, to the French parliament, under the Fourth as under the Third Republic, and the so-called sovereignty of the nation is scarcely more than a political principle, secured, no doubt, through certain rules of constitutional law, by which legislative authority is derived from the people and exercised on behalf of the people.

In this country the actual process of legislation differs considerably from the theory, according to which laws are made by two independent legislative bodies, subject to a royal veto. Nor does the theory correspond with the myth, which presents the picture of the Queen seated on her throne enacting laws with the advice and consent of the Peers and of delegates of the people gathered around her. The existence of the myth, however, goes some way to explain how parliamentary sovereignty has come to be accepted as the equivalent of parliamentary omnipotence. What does parliamentary sovereignty signify, not in myth, but in reality? It signifies (1) that the three constituent parts of

Parliament, acting together, are entitled to make rules which will invariably be regarded as binding by British courts of law, and will be preferred to rules emanating from any other source whatever; and (2) that the constituent parts of Parliament have the exclusive right to determine by agreement between themselves what their mutual relations shall be and how their authority shall be exercised. These two propositions are established beyond dispute, and, of course, are far from being of interest only to lawyers. But they do not add up to the conclusion that Parliament is omnipotent, even in law. Apart from the fact that Parliament could not legally do certain things, *e.g.*, deny justice to an alien, because they would be contrary to international law, Parliament cannot in any sense be legally omnipotent unless it becomes something more than a name, because both propositions postulate agreement between the three parts of Parliament. It may be said that this is merely technically true, since the royal assent is a formality and the authority of the House of Lords has been reduced to a shadow. Yet in certain circumstances a technical point may come to have vast practical importance.

Let us suppose that the House of Commons obtained the royal assent to a Bill abolishing the House of Lords, and then induced or compelled the Queen to acquiesce in another measure providing that any Bill which had been passed by the House of Commons should be deemed to have received the royal assent. The consequence would be that the House of Commons would in fact become Parliament, and would be fully sovereign. There would be nothing in law to prevent it prolonging its own existence indefinitely, or doing anything else it pleased, contrary perhaps to the will of a clear majority of the electorate. Such a situation is unlikely to arise in the absence of a political conflict serious enough to bring the country to the verge of civil war. In that event the exercise of the Queen's right of vetoing legislation might conceivably become as decisive as was the equally technical point of the King's right to pack the House of Lords by a wholesale creation of new

peers in the constitutional conflicts of 1832 and 1911. The maintenance of constitutional government probably in the last resort depends more than is generally realised on technicalities that appear to be accidental survivals from the past.

Joint sovereignty implies divided sovereignty, and that implies limited sovereignty. Sovereignty in a constitutional State must, perhaps, be limited in some way. Unlimited sovereignty and limited government do not go together. On the other hand, it does not seem to make any fundamental difference how precisely sovereignty is limited, whether by dividing up sovereign authority or by imposing restrictions on its exercise. Every country, or almost every country, except our own possesses a formal constitution, whose provisions enjoy a higher status than those of an ordinary legislative act, and cannot be altered by the legislature, at least by the normal process of legislation. Does it, however, follow that, for example, the Belgian and Irish legislatures are essentially inferior in status to the British, because certain laws cannot be enacted without a special procedure, involving an appeal to the electorate? No doubt the flexibility of the British constitution is a great convenience. But to assert, as Dicey does, that a legislature which lacks this advantage, that is to say the legislature of nearly every other country in the world, is a non-sovereign law-making body is to carry veneration for the Mother of Parliaments to an extravagant length. Where, then, in the case of these lesser breeds, is sovereignty to be located? The answer, apparently, is that sovereignty belongs to that body of persons which has the right to amend the constitution. Thus, following Austin, he suggests that "the legal sovereignty of the United States resides in the States' governments as forming one aggregate body represented by three-fourths of the several States at any time belonging to the Union."[9] Yet, if Parliament is merely a name, such a sovereign is deficient even in that degree of reality. Not only do the governments of the States not form an aggregate

[9] *The Law of the Constitution*, 9th ed., pp. 148–149.

body in any way whatever, but it would be illegal for them to attempt, without the consent of Congress, to do so under the constitution of the United States.[10] There are other strange consequences of Dicey's theory. For example, the constitution of the Third French Republic could be amended by a simple majority of the two Chambers sitting together as a National Assembly. Were the two Chambers then sovereign or non-sovereign, according to whether they sat separately or together?

There is, perhaps, one instance where a determinate body of persons entitled to make constitutional amendments can be identified, namely where provision is made for amendments to be submitted to the electorate of a country by way of referendum. Here the electorate may possibly be said to be in a proper sense sovereign, since it votes as a whole for or against a particular measure, or series of measures, assuming quite a different part from that which it plays when voting for parliamentary representation in separate constituencies. But this is plainly a very slight foundation on which to construct a theory of the location of sovereignty under a formal constitution. In the case of Belgium, the constitution can only be altered after a proposed amendment has been put before the electorate in a general election and subsequently approved by a two-thirds majority in each house of the legislature, while proposed amendments to the Irish constitution must be submitted directly to the people of the Republic for their approval after being accepted by the legislature. Does it result from this difference of procedure that in Ireland the electorate is sovereign and in Belgium it is not? The most that can be maintained is that, where a referendum is provided for, some small share of sovereignty belongs to the electors, for the circumstances in which they can exercise the right of amending the constitution are restricted, and, in any event, the right is itself perhaps not of major importance. It does not follow, because the constitution is superior in status to an ordinary legislative act, that the power of altering it must be of

[10] Article 1, § 10.

greater consequence than the power of making ordinary laws.

In practice, formal constitutions, even when they can easily be altered, are not often altered, and then usually in matters of detail. The oldest of existing constitutions, that of the United States, is in all essentials the same as when it issued from the Convention of Philadelphia in 1787. Or rather, it is the same on paper, since the meaning of many of its articles is utterly different from the meaning originally attached to them, not because of formal amendment but partly through judicial interpretation, partly by the growth of usages and conventions, partly owing to the fact that identical words mean different things to different generations of men. However much the meaning of its articles may have changed, the authority of the Constitution is as great, or greater, now than ever it was. It is none the less true that the Senate and the House of Representatives are sovereign bodies. An Act of Congress, provided it keeps within the ambit of Congressional jurisdiction, is just as binding on all American courts of law as an Act of Parliament on British courts, being "the supreme law of the land" equally with the provisions of the Constitution.[11]

By its ultimate right to interpret the Constitution, the Supreme Court has a certain power of control over Federal as well as State legislation. But this power amounts to something quite different from a general censorship of legislative activity. The Supreme Court can pronounce a Federal statute *ultra vires*, but only in the course of determining a particular issue brought before it and subject to a presumption in favour of the validity of the statute. In strict accuracy, the court does not declare the statute to be unconstitutional but merely refuses to apply it on the ground that it is not a law at all. Although the process of interpretation may enable the court to declare within elastic limits what the Constitution means, the fact remains that it must apply the existing law, and that where express powers are granted to Congress by the Constitution its right

[11] Article VI.

to exercise them cannot be disputed. Besides, it is a fundamental principle accepted by the court that Congress has a wide range of implied powers in addition to powers expressly bestowed on it. In short, nobody can tell Congress directly what it must not do, far less what it must do, and it is in marginal cases alone, where there is legitimate doubt how far the constitutional sphere of action of Congress extends, that the Supreme Court can intervene decisively, if its intervention is sought by litigants but not otherwise. The court has generally been slow to condemn Federal legislation, and on the whole has done much more to augment than to diminish Federal authority. Since it is itself a part, though an independent part, of the Federal Government, that is not altogether surprising.

Whether or not there is a body of judges, as in the United States, entitled to pronounce upon the constitutional validity of legislation, it would be a mistake to lay too much stress on either the existence or the contents of a formal constitution. It will almost always operate quite differently from the intention of its founders, and more and more as time goes on, since future generations will not let themselves be imprisoned within a political formula designed to suit the needs of their ancestors. Out of filial respect, or because of practical difficulties, they may refrain from altering its provisions, but they will not usually find it hard to circumvent them if they desire. A constitution, however far-seeing those who framed it, cannot provide for everything. It will consist of a number of general, and therefore necessarily vague, rules, together with a few matters of detail, principally relating to the organisation and powers of the different branches of government and the relations between them. Its provisions, even if detailed, are addressed, not to the citizens but to those exercising governmental functions. For example, the 18th Amendment to the United States Constitution declared that "After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United

States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited." It was not, however, by means of this provision, although its terms could hardly be more specific, that Prohibition was enforced, but by legislation, namely the Volstead Act, passed by Congress in virtue of the Amendment. From the point of view of the citizens (and, after all, government exists for them, not vice versa), what is important is not, at least primarily, how far the legislature has the right to make rules which bind them, but what the rules say and what consequences follow if they are not obeyed. An individual citizen of the United States may take the risk of disregarding a Federal statute if he pleases, on the chance that it may turn out to be unconstitutional, just as a citizen of this country may choose a disobey a Ministerial Regulation, in the expectation that it will be held to be *ultra vires*. But few persons think it wise to take chances of this kind unless, which rarely occurs, the statute or regulation is obviously bad. So far as the ordinary citizen is concerned, an order addressed to him by an authority clothed with a right prima facie to issue that order is one which he will almost invariably regard as obligatory, however much he may dislike it.

If sovereignty cannot be located in the persons who have the right to amend a constitution—except perhaps in certain cases and then to a minor extent, or in a court of law entitled to expound a constitution, or in a constitution itself, which is merely a scrap of paper, or, presumably, in the ghosts of the founding fathers—the question where it is to be discovered still remains to be answered. There seem to be two possible answers. One is that the whole conception of sovereignty is unsound and unnecessary. It is a dogma which owes its origin to a particular set of historical circumstances and which, since these circumstances have ceased to exist, no longer serves any purpose. To inquire where in any State sovereignty is to be found is therefore useless.

If the theory of sovereignty means that to every political community there must be some person or persons possessing unlimited authority, then it is true that sovereignty is an

untenable idea. But nobody has ever really conceived of sovereignty as implying freedom from every obligation whatever. Even Hobbes' sovereign is limited, for his authority only lasts so long as he is able to govern effectively, and resistance to him is legitimate if he cannot. He is therefore under an obligation to his subjects to maintain himself in power. Similarly, those who asserted the divine right of Kings, in its most extreme form, while they maintained that subjects must obey the commands of the King even if they were flatly against the laws of God, did not deny that the King was bound by the laws of God. Unlimited legal supremacy is, indeed, a self-contradictory notion, for any ruler who claims to possess legal authority admits by doing so that there is some legal justification for his rule, and accordingly that there must be some limit to what he is entitled to do. To argue the contrary involves the strange conclusion that law can confer on a man the right to act as if law did not exist.

Sovereignty, therefore, is not inconsistent with control by law, human or divine. What it is inconsistent with is control by, or rather legal subordination to, any human being. In this sense there does not seem to be insuperable difficulty in locating it in any existing State, although sometimes, as in the case of the United States and Switzerland, it may be divided up in a complicated fashion. That it is a necessary conception is scarcely open to argument, if consideration is given to what is involved in a political theory which dispensed with it. Unless there is a hierarchy of authorities in a community, each one entitled to issue orders of a certain description, or within a certain sphere, and itself subject to the will of a higher authority, anarchy is bound to prevail. And ultimately it must always be possible to arrive at an authority which is not subject to the will of any other person or persons, whose decision therefore is final. It is not, however, essential that there should be a single person or body of persons invested with the right to make every ultimate decision. Thus the United States Congress (which

is itself an authority consisting of two separate and co-ordinate bodies) has an exclusive right to determine customs duties on imported goods,[12] while the legislatures of the States have the sole right to pass divorce laws.[13] In some instances, for example, direct taxation and excises, Congress and the State legislatures have concurrent rights.[14] This, of course, implies mutual restraint and for practical reasons is only conceivable within narrow limits. It would not be possible to give Congress and the State legislatures concurrent rights to regulate the value of the currency or to declare war. But the House of Representatives and the Senate have concurrent rights in these respects and in almost every other as well.

II

Let it be assumed that the theory of sovereignty put forward above is valid, that it enables a clear and consistent, and also useful, meaning to be attached to that inflated term. The next step is to show that the theory is applicable within a society of States in the same way or within a single State. It is first necessary to distinguish between several different senses in which the word "State," like the word "sovereignty," is ordinarily used. In particular, when we speak of the "State" as opposed to the individual, we mean by "State" something quite distinct from what we mean when we say that a "State" is bound by the rules of international law. Looked at from the inside, the State is, as it were, transparent. We can identify a cabinet, a legislature, government departments and a judiciary. But these are only organs of the State, and if they are combined together they still do not constitute the State. The State is an institution, and as such is an abstraction. It has, indeed, a certain reality and is more than a mere name, like Parliament, although the exact manner in which it can be said to exist is a question that may be left to metaphysicians. For the purposes of legal or political science, all that matters is that, perhaps because of the mutability of human affairs

[12] Article I, §§ 8 and 10.
[13] 10th Amendment.
[14] Article I, § 8, 10th Amendment, 16th Amendment.

and the brief duration of human lives, men find it essential to establish institutions, and, when they arrive at some measure of civilization, to create the political institution known as the State.

Looked at from the outside, on the other hand, the State is opaque. There is nothing abstract about it. It is nearly, though not quite, identical with the nation, that is to say it is a large collection of human beings organised politically and differing from a crowd or a tribe in degree rather than in kind. When two States are at war, it is not a question of two institutions dropping bombs on each other. They would do no harm if they could, since an institution is immune from any mortal weapon. Nor is it a question of two governments fighting a duel. The governments may be the ringleaders; but it is the people who are the contestants.

Consequently, while the State as institution cannot be sovereign, the State as political community can be. In the first case it is an abstraction, no less incapable of possessing supreme authority than of performing governmental functions, but serving as a vehicle within which authority and power are exercised. In the second case, the State itself may be sovereign in the same way as any other body of persons, since it consists of a determinate number of individuals, occupying a particular territory and acting through agents for whose behaviour it may be made responsible by other States. The difference is that between an organisation and the persons organised. There is a corresponding difference in legal terminology. If a citizen of this country wishes to obtain a legal remedy against the State he can sue the "Crown," which is the name given to the State as institution. But when the State is regarded as a member of the United Nations, that is as a unit in the society of States, it is called "the United Kingdom." It is essential, in order to avoid confusion of thought, to keep in mind these two meanings of the word "State," and, when dealing with the State in relation to other States, to use the word only in its concrete sense. No doubt, to speak of "State sovereignty," referring to the State as institution, is

not meaningless, any more than the term " popular sovereignty." Popular sovereignty may be mythical in a proper sense, but it is by no means devoid of political significance. So, too, if by " State sovereignty " is meant the supremacy of the State as institution over other institutions, then the term is certainly significant. Both " State " and " sovereignty," however, have here a meaning wholly distinct from that which they bear when " State sovereignty " is used as equivalent to " national sovereignty."

The sovereignty of a State as community, or nation, has a positive and a negative aspect.[15] Positively, a sovereign State has paramount authority over its own territory, including the air space above and waters round its territory, and over its individual citizens and any subject communities. Negatively, a sovereign State is independent, that is to say it is free from the control of any external authority. It does not appear that the concept of sovereignty, as applied to a society of States, can mean anything either less or more than this.

Political reality, of course, need not coincide with the theory, which is purely legal. A State which is independent in law may have little appreciable independence in fact. The divorce between power and right is notoriously wider in the sphere of international affairs than almost anywhere else. It might therefore be imagined that the theory of national sovereignty, being just a principle explaining how States behave, when they behave in a legal manner, would be a somewhat uncontroversial, if not academic, question. But, on the contrary, it is a principle which arouses the fiercest animosity, and is often said to be incompatible with peace and international order. That can hardly be unless it is regarded as something other than a merely legal principle, by lawyers as well as laymen. And so quite plainly it is. " For the practical purposes of the international lawyer," Brierly writes, " sovereignty is not a metaphysical concept,

[15] The distinction generally made is between internal and external sovereignty. But positive and negative sovereignty seems to be a more accurate classification, since it is the nature of the authority, not the place where it is exercised, that matters.

nor is it part of the essence of statehood; it is merely a term which designates an aggregate of particular and very extensive claims that States habitually make for themselves in their relations with other States." [16]

Like other statements to a similar effect, this is puzzling, in that it seems to carry the implication that, because a right may be abused, there is something wrong with the law which recognises the right. The fact, however, that the right, let us say, to sue for breach of contract may be liable to abuse, where a wealthy corporation enters into contractual relations with a poor man, is not considered a reason for arguing that breach of contract should not be actionable, although it may be a reason for laying down certain rules intended to prevent abuse. So, too, the fact that States may frequently abuse the rights which flow from their sovereignty is surely not a good reason for condemning those rights in themselves. It is no doubt desirable that their exercise should be restrained in some way, that a State should not be free to fix the level of its armaments, or regulate its economic life, without regard to the effect upon other States. But claims of this kind, although made in virtue of sovereignty, are not inherent in sovereignty, and could be limited without detracting from it. The doctrine of sovereignty, in its proper sense, is the reflection in legal terms of a factual situation. A legal theory, like a theory of natural science, may be said to be sound or unsound, adequate or inadequate, but moral indignation against it is misplaced. If the theory of sovereignty, or the theory of evolution, have evoked strong emotions, that is only because human beings instinctively resent uncomfortable truths. But when he asserts that men are descended from monkeys, the biologist is only making a statement of fact, not saying that he approves of it; and the legal, or political, scientist, when he puts forward

[16] *The Law of Nations*, 4th ed., p. 48. Elsewhere he says of sovereignty that it stands for "the power of modern States, the power of their governments to decide and to act without consulting others and without concern for anything but their own interests as they themselves conceive those interests" ((1949) lxi *Juridical Review*, p. 5). Clearly Dr. Brierly is using the word "power" wholly or partly in the sense of force, and not purely of legal right.

a theory based on the ascertained fact that States behave in a certain way, need not suppose it to be a good or a bad thing that they should behave like that.

While States remain actually and also in law independent of one another, international law cannot dispense with the concept of sovereignty. Indeed, its very existence presupposes the sovereignty of States. A large part, or even most, of its rules are designed to protect their sovereignty from invasion, like the exclusion of matters within the domestic jurisdiction of a State, or the rule that a State is not bound by the provisions of a treaty to which it has not consented. The Covenant of the League of Nations was impliedly and the Charter of the United Nations [17] is expressly based on the principle of the sovereignty of the member States. It is accordingly erroneous to think that there is necessarily any opposition between the doctrine of national sovereignty and international law, or international order in so far as it is a product of law. This is only true, it may be objected, because international law is weak and its rules vague and incomplete. Let it be supposed, however, that international law were strong, that its rules were precise and comprehensive, and that States, if they did break its rules, invariably submitted to the decision of an international tribunal. Yet they would still continue to be sovereign States as much as before.

Of course, if national sovereignty means that States are invested with an absolute and unlimited authority above all rules of law, then there is no possibility of reconciling the sovereignty of States with a belief in the obligatory nature of international law. Writers who have attempted this feat have found themselves in a dilemma from which there can be no escape. Either States are subject to international law, in which case they are not supreme in an absolute sense,

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[17] Article 2 (1). The reference to the sovereignty of the members is not otiose, since the Charter contains what is at least in principle a very important exception to the general rule in the power given to the Security Council to make decisions binding on all members for the limited purpose of maintaining or restoring peace (Articles 25 and 39). Thus the five permanent members of the Security Council are alone, by reason of their veto, sovereign in the fullest sense.

or else they are free to disregard international law if they think fit, in which case it is not law at all. Most of them, at all events until recently, have fallen back on the latter alternative. Yet it is one which is completely contradicted by the facts of international intercourse. States often act, no doubt, with small or no regard to the rules of the international law, but they never openly admit that they are entitled to do as they please. This is not explained by calling it hypocrisy. The reason is, as has been pointed out above, that a State which asserted that it was not bound by any rule of law could not claim in the same breath that its subjects were legally bound to obey it. It would follow also, if sovereignty meant absolute authority above all law, that a State which entered into a treaty with another State could never claim that the terms of the treaty were binding on the other State without denying the sovereignty of the latter. But that, again, is obviously a conclusion contrary to the practice of States.

To say that a State surrenders its sovereignty, or any particle of it, by the mere fact of entering into an obligation that imposes a limitation on the exercise of its sovereign rights, is like saying that a man necessarily becomes the servant of another by contracting with him. In other words, freedom of action is one thing and sovereignty is an entirely different thing. A State can surrender part of its sovereignty, or even all of it, by treaty, just as a man can enter into a contract of service with another man. But even an onerous and one-sided treaty obligation may be consistent with the maintenance of full sovereignty by the State upon which the obligation is imposed. Thus in the case of the *Wimbledon* [18] it was argued before The Hague Court that the obligation laid on Germany by the Treaty of Versailles to keep the Kiel Canal open to the vessels of all nations at peace with Germany should not be interpreted literally, because such an interpretation would deprive her of an essential attribute of her sovereignty. But the court declined " to see in the conclusion of any treaty by which a

[18] P.C.I.J., Series A. No. 1 (1923), at p. 25.

State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a particular way. But the right of entering into international engagements is an attribute of State sovereignty."

It is clear, therefore, that there is a fundamental distinction between a limitation on the exercise of sovereignty, on the one hand, and a surrender of sovereignty, on the other hand. It seems equally clear that a State only surrenders its sovereignty when it becomes subordinate to another State or States, or to some body of persons capable of assuming authority over it. The mistake of mixing up subjection to law with subjection to a human superior perhaps arises from the common habit of identifying a figure of speech with a reality. When we say that a State is subject to another State we mean that the latter is entitled to control the actions of the former. But, when we say that a State is subject to a general rule of law or a particular treaty obligation, we mean only that it is bound to conduct itself in accordance with that law or obligation. No question of control by any external authority is involved. Men are not governed, except metaphorically, by law.

The advantage of the theory here maintained, as applied to States in the sense of political communities, is that it seems to enable an adequate definition to be given of national sovereignty, free from ambiguous political implications. Nobody can tell with any approach to precision whether a particular nation or State, Holland or Czechoslovakia, for example, is politically independent or not. A Russian would no doubt declare that the latter was and the former was not. An American or an Englishman would be of the opposite opinion. But neither side would deny, or at least could consistently deny, that Holland and Czechoslovakia are both sovereign States, that they are in law independent. A sufficiently clear distinction can be drawn between a State that is sovereign and one that is not, and

between one that is fully sovereign and one that is in some degree only partially sovereign. The test is whether it is free, not *de facto* but *de jure*, from external control and, if not, to what extent it is controlled externally. So long as it possesses some degree of independence in law and paramount authority somewhere, a State must have a share of sovereignty. If it is fully independent in law, however weak politically, and is completely paramount over its own territory and citizens, however limited the territory and scanty the number of citizens, it is fully sovereign. Consequently, a State can be deprived of its sovereignty in whole or in part in two ways only, namely by losing its legal independence, wholly or partly, or by suffering its paramount authority to be superseded in whole or in part. In either case its sovereign rights are not affected unless it becomes subordinate in some way to a human superior. For instance, a State will suffer a total loss of sovereignty if another State acquires a right to veto any measure passed by its legislature; and a partial loss if it allows another State to exercise certain governmental functions within its territory, to the exclusion of its own paramount authority.

It is to be noted that a loss of paramountcy, or positive sovereignty, to another State involves control by that State as well as a loss of negative sovereignty. This is best illustrated in a federal union, which consists of a large political community embracing a number of smaller communities, in such a way that both the larger unit and the smaller units possess sovereign rights, and the individual citizens of the union owe obedience simultaneously to the federal and to the regional governments. Thus in the United States, the Union, or rather its organ the Federal Government, controls the States directly and also indirectly. Its direct control of the States is exercised in virtue of provisions in the Constitution which, for instance, prohibit the States from doing certain things, such as imposing duties on imports or exports, without the consent of Congress.[19] But far more effective is its indirect control of

[19] Article I, § 10 of the United States Constitution.

the States, by means of constitutional powers that derogate from their positive sovereignty. That is to say, by possessing direct authority over individual citizens the Federal Government deprives the States of a part, and the most important though not the largest part, of their paramount authority within their own territories. What matters is, not so much that the States cannot regulate imports of goods into their territory, but that the Federal Government can and does. Through this and its other powers the Federal Government dominates the economic life of the States, and indeed prevents them from pursuing, except to a very minor extent, policies of their own choosing in any field open to federal intervention.

Just as the obligatory force of international law is not inconsistent with the sovereignty of States, so they do not lose their sovereignty by being subject to any other abstraction, such as a majority of their own number. If several States join together to form a league, or confederation, either on a universal scale like the League of Nations, or on a regional scale like the American Confederation of 1781–1788, or the German Confederation of 1815–1867, with permanent organs to ensure co-operation between them but without a central body empowered to make decisions binding on the members, then the members retain their full sovereignty, and it is of no essential consequence that certain questions may be decided by a majority vote. A collection of States cannot surrender their sovereignty to themselves, whether their collective decisions require unanimity or not. Suppose that Tom, Dick and Harry agree to go for a walk. If Tom and Harry tell Dick to lead the way, they undertake, as far as their walk is concerned, to submit themselves to the superior authority of Dick. He is sovereign. But if they decide that in case of doubt arising which road to take the opinion of the majority shall prevail, they do not submit themselves to anybody's authority. All three are sovereign. They merely lay down in advance a procedure to be adopted in case of a deadlock of opinion. It is otherwise where States agree to form a

union, whether of the kind known as a federal union or of some other kind. If the word "union" is to mean anything it must imply a surrender of sovereignty and therefore the transfer of sovereign rights to an authority distinct from the constituent States. Thus in 1789 a new sovereign State, the United States of America, appeared on the international stage. Instead of 13 United States and a Congress which was merely, as John Adams said, a diplomatic assembly, there came into existence a United States in the singular and a Federal Government having a separate will and exercising authority over them, but not so as to take away their sovereignty altogether.[20]

Supreme authority must exist somewhere within a State, or else conflicts of jurisdiction will lead to anarchy. In the same way it must be discoverable within a society of States, if it is to be a society in any sense at all, and not a jungle. But there is in fact no supra-national authority recognised by States as superior to them. Sovereignty therefore belongs to them as members of the society individually. It may be true that they often abuse their sovereign rights, and that international order is certain to be precarious unless the rule of law can be established in the international sphere. Yet the problem is not merely, or primarily, a legal one. International law limits the exercise of their sovereign rights to some extent at present. If it is developed further it may be capable of doing so more effectively. Otherwise there is no hope except in setting up a supra-national authority which will curtail their sovereignty. That, however, is mainly a political problem, which must be solved by political means, for to deprive them of supremacy *de jure* while leaving them supreme *de facto* is not sufficient and, indeed, would make international law still weaker than it is instead of strengthening it. If the practical consequence of reforming the law were, not to reform the

[20] Since the States are within the Union, it is for them an institution and not a community. Thus it is Congress which possesses sovereignty from their point of view. On the other hand, Congress, being external to them, exercises authority over the States, not over the State legislatures.

behaviour of States but to cause them to disregard it more readily, there would be a loss rather than a gain. The doctrine of national sovereignty cannot fairly be blamed for the bad behaviour of States. On the contrary, it serves the purpose of restraining them from worse behaviour, since governments, even if they are not honest enough to uphold the rights of other nations equally with those of their own, are at least able to see that the maintenance of certain rules regulating the behaviour of States generally is in the interest of every nation. But the doctrine of national sovereignty cannot be discredited without destroying the basis of a large part of these rules, so long as States are *de facto* supreme and free from external control.

Of course, when people say, as they so often do, that States must give up part of their sovereignty if they are to preserve themselves from perpetual conflict, it is really *de facto* supremacy that is uppermost in their minds. And it is easy to excuse them, at least if they are laymen, for failing to distinguish *de facto* from *de jure* supremacy, since while the distinction is essential for the purpose of exact reasoning, the two forms of supremacy are in practice often difficult to keep separate. The legal independence of a State may be compatible with complete political dependence. But such an extreme case seldom, if ever, occurs. Normally however much one State is dominated by another there will always be some residue of self-determination left to it, if only because the dominant State is unwilling to allow its supremacy to appear too blatant. It is a great mistake to think that legal supremacy is equivalent to nominal supremacy or generally that, because legal right does not always correspond with power, it is therefore unimportant. There are many things one cannot do, although one has the right to do them. But at the least it is a substantial advantage to have the law on one's side.

Accordingly, while the problems involved in a surrender by States of their sovereignty are mainly, they are not by any means solely, political. Let it be assumed that a number of associated States have decided to establish a

union, because they find that a mere alliance or league between them is insufficient to achieve their objects. They must first of all be willing to give up, not on paper but in actual fact, part of their independence in favour of some supra-national body endowed with effective powers. Unless they are prepared for that, it is meaningless to talk of a surrender of sovereignty. If, however, the decision is made, the next step is to draw up a constitution which will settle in precise terms the legal basis and structure of their union. It is hardly conceivable that they will be content with anything else, for they run the risk either that some of the members will interpret their obligations so narrowly that the union becomes a mere name, or, on the other hand, that they have given up not a part but the whole of their independence. No doubt, in the last resort a union, like every other combination of States, must be dependent on the good faith of its members. But all experience proves that it is unwise to place reliance on good faith alone.

The question of sovereignty is plainly the principal issue in the constitution of any union of States, as the debates at Philadelphia in 1787 and the subsequent history of the United States up to the Civil War show. Everything depends on where ultimate authority rests, how far the central government is given a right to control the member States, and what jurisdiction is left to them. It is often, however, taken for granted that the particular form of union, namely federal union, which has been adopted by the Americans and the Swiss and others, is the only possible form of union between States. This is, perhaps, an erroneous opinion. In any event, it is likely that federal union, in the American or Swiss sense, is a constitutional arrangement that can be successful only in certain conditions. To attempt to apply it to an association of large modern States would be a very dubious undertaking. The problem whether a union of a different kind, which left a more important share of sovereignty to the member States, would be practicable is one that still awaits an answer.

K. W. B. Middleton.

RECENT LEADING SCOTTISH CASES

By David M. Walker, m.a., ll.b., ph.d., Advocate

The recent decisions on consistorial law have been something short of satisfactory. In *Wallace* v. *Wallace*, 1952 S.L.T. 165, a deserting husband spent two nights in his wife's house during the currency of the triennium, but did not resume marital relations. The case was reported to the Inner House for guidance on the general question of what circumstances permit a temporary resumption of cohabitation to be not incompatible with the persistence of desertion. Unfortunately, the Second Division were unable to give any very clear guidance. Such circumstances *ex hypothesi* amount to an exception to the ordinary case where continuous non-adherence during the triennium leads to an inference of continued malicious desertion and, the possibility of exceptions having been long admitted, the difficulty is to define reasonable bounds for the exceptions, and to distinguish the brief but genuine attempted reconciliation from the possibly longer return merely for convenience or to defeat the pursuer's right. There is also the question whether intercourse or any other single factor is conclusive either way. The crucial matter is surely the *animus* of the defender, which has to be judged from external facts and the evidence of the pursuer. A defender having been shown to have deserted wilfully and without reasonable cause must be presumed to have a continuing *animus deserendi* so long as he does not return. The nature and extent of any temporary return may or may not show that this *animus* has ceased, though it may soon revive; or it may have continued: *Crawford*, 1946 S.L.T. 138. The initial onus of showing the defender's *animus deserendi* is clearly on the pursuer: the onus of showing its continuance uninterrupted, despite the prodigal's return, continues to fall on the pursuer with increasing weight as the renewed cohabitation continues and involves more of the strands of consortium, affection, support, sympathy, intercourse, mutual regard and comfort, companionship, etc. (*cf. Best* v. *Samuel Fox*

DIVORCE—Desertion—Effect of break in triennium

[1951] 2 K.B. 639) till after a period the inference becomes irresistible that cohabitation has been resumed, at least temporarily, in which case the triennium is broken. On this view a single act of intercourse might not *per se* break the triennium: *Mummery* [1942] P. 107; *Crawford, supra*; or it might do so: *Meiklem*, 1949 S.L.T. 370.

The onus on the pursuer is, however, always heavy, and will always involve rebutting the presumption that the resumption of cohabitation for any period is bona fide and breaking the triennium. The judgment in this case has little value beyond the particular case in issue.

DIVORCE—Mental cruelty

In *Jamieson* v. *Jamieson* [1952] 1 All E.R. 875, the House of Lords have reversed the decision of the First Division for reasons which similarly afford little guidance in future questions of this kind. The House professedly sought to cast no doubts on the right of the court to reject a case on relevancy, but the import of the decision is in fact that practically any reasonable averments will suffice to obtain a proof, in the hope that enough evidence will turn up to justify decree. There is also an unfortunate tendency to extend the principle of the sanctity of the views of the Lord Ordinary who saw and heard the witnesses (*Thomas*, 1947 S.C.(H.L.) 45, as to which see further Smith in 62 Jur.Rev. 1) to relevancy. The decision also seeks to lay down what has come to be a familiar proposition from the House, that there is no difference between the law of Scotland and the law of England on the matter. With respect, it seems doubtful, having regard to the different lines of development, if the similarity of principle amounts to identity.

DAMAGES—Death of husband—Loss of support

Two points on damages to widows for loss of support consequent on their husbands' deaths have recently figured in the reports. In *Leadbetter* v. *National Coal Board*, 1952 S.L.T. 179, a mother and children sued jointly and damages were awarded: on a motion for a new trial on the ground of excess of damages the Second Division allowed a new trial *quoad* the widow's claim but refused it *quoad* the children. The competency of this course was not argued but it is submitted that, even so, the court was in grave

error in allowing it since (a) there is no precedent for such a course, and (b) in *Kelly* v. *Glasgow Corporation*, 1951 S.C. (H.L.) 15, 20, Lord Normand pointed out that all the claims in an action of this kind had to be considered as inter-related family claims. The only apparent exception to this seems to be where some of the family accept sums tendered and thereby disappear from the process, but it is another matter for the court thus to take some of them out of the process for the purposes of a new trial. A rather more fundamental point arose in *Cruickshank* v. *Shiels*, 1952 S.L.T. 170, where the question was whether a defender might relevantly aver and prove in mitigation of damages for loss of support that a widow had substantial private means available for her support. The real question is whether an award for loss of support is to be based on the amount of pecuniary support her late husband could give her, or is it to be only such sum as, with her own funds will give the pursuer reasonably adequate support. The court did not discern, still less did they answer, this fundamental question, but merely held that the averments in question were irrelevant, and it is submitted that their decision was correct but the reasons inadequate and unconvincing. The true nature of loss of support is still judicially clouded.

NEGLIGENCE—Locatio custodiae

Sinclair v. *Juner*, 1952 S.L.T. 181, revives memories of examinations with a neat problem purely on common law. A car was burned out for no explained reason while deposited in a garage for repair. While there was no express *locatio custodiae*, it was held that a *locatio operis faciendi* which involved leaving the subject in the possession and care of the tradesman implied an inherent *locatio custodiae*. Fire, moreover, is not a *damnum fatale* excusing the custodier unless shown to be accidental and not due to culpable acts or negligent omissions. In this case the defender had failed to discharge the onus of showing that the fire was accidental and hence he was liable for the value of the car destroyed. When one considers how frequent contracts *operis faciendi* must be, the decision is of wide general importance: a repairer who takes your goods into his premises to keep while he works on them is an onerous custodier and owes a duty to take such care of the goods as a prudent man would in the circumstances. Consequently he is

liable if he cannot give some explanation if the goods cannot be restored.

There remain from the term two noteworthy decisions on the recovery of documents under a diligence. In *Downie* v. *H.M. Advocate*, 1952 S.L.T. 159, it was sought in the High Court in respect of documents desired for the defence in a criminal trial. The question of competency was not determined, however, in the circumstances but remains for another occasion, as the Crown agreed to produce the documents if need for them were established.

COMMISSION AND DILIGENCE— Recovery of documents

McKie v. *Western S.M.T. Co.*, 1952 S.L.T. 191, was the other, where, in a reparation action, the defenders sought to recover a report made by a police officer who had been incapacitated from attending to give evidence. The Lord Advocate's objection to production on the ground of public policy was sustained. It would appear that the power of the court to order production is severely limited and an objection validly taken by the political head of the department concerned is conclusive, and this applies with particular force to an objection by the Lord Advocate as the head of the system of criminal justice in Scotland. If that be the law it looks very much as if another department of justice is dependent on what is substantially the rule in *Liversidge* v. *Anderson* [1942] A.C. 206. The actual decision, relating to a police officer's report, is probably inevitable if only in view of the prior authorities, but when more and more human activities are affected by and depend on the actings of departments of state, the width of the principle is regrettable and it is hard to see that there is anything left of the right of the court to demand production of the evidence. Public policy is more potent than justice between man and man.

RECENT LEADING ENGLISH CASES

By W. A. Elliott, m.c., b.l., Advocate, and of the Inner Temple, Barrister-at-Law

COMPUTATION OF DAMAGES: Whether disability pension falls to be taken into consideration.

In *Payne* v. *Railway Executive* [1952] 1 Q.B. 26, the Court of Appeal has decided that a sailor's naval disability pension falls to be disregarded in assessing damages due to him for injuries caused in a railway accident, where the pension becomes payable as a result of the same accident. Cohen and Birkett L.JJ. considered that just as a wrongdoer cannot appropriate to himself insurance moneys (the benefit of premiums paid by the injured party to cover risks of accident), so also he cannot appropriate benefits arising from the naval service of the injured person which similarly entitled him to those benefits. The *causa causans* of the receipt by the plaintiff of his disability pension was his service in the Royal Navy; the injury incurred was but the *sine qua non*. Singleton J. preferred to base his similar conclusion on the fact that an Order in Council (corresponding to the Royal Warrant in the case of sailors) gives the Minister of Pensions the right to withhold or reduce the pension because of the award of damages. It will be remembered that in *Moorcroft* v. *Alexander & Sons*, 1946 S.C. 466, it was held by Lord Patrick that a service dependant's pension should be taken into account in assessing damages to which she was entitled; similarly, in *Adams* v. *Spenser & Co.*, 1951 S.C. 175; 1951 S.L.T. 223, the First Division has held that a widow's death benefit under the National Insurance (Industrial Injuries) Act, 1946, falls to be taken into account. But these decisions do not affect the case where the injured person is himself the pursuer. The dependant's right to recover patrimonial loss arising from the decease of his or her relative is subject to reduction in respect of all patrimonial gain also accruing from that decease. But where the injured person is the pursuer, he does not require to subtract moneys received through his own forethought in insuring himself, nor, it now seems, pensions and benefits arising from his service or employment. *Payne* may therefore still be followed in Scotland.

BREACH OF STATUTORY REGULATION: Whether ground for civil action for damages.

The speech of Lord Kinnear in *Black* v. *Fife Coal Co.*, 1912 S.C.(H.L.) 33; 1912, 1 S.L.T. 20, provides a well-known definition of where the breach of a statutory regulation also entitles an injured person to recover damages in civil proceedings. This speech was referred to by Finnemore J. in the recent case of *Biddle* v. *Truvox Engineering Co., Ltd., Greenwood and Batley, Ltd. (Third Party)* [1952] 1 Q.B. 101, where his Lordship had to decide whether a breach of section 17 (2) of the Factories Act, 1937 (which imposes a penalty on the vendor of an inadequately guarded machine), also entitles an injured factory employee to recover damages from that vendor in civil proceedings. The employee in question recovered damages from his employers for injuries sustained through their failure to guard a certain machine as required by section 17 (1) of the Factories Act, 1937. They then claimed contribution from the sellers of the machine in terms of section 6 (1) (*c*) of the Law Reform (Married Women and Tortfeasors) Act, 1935 (which is the English counterpart of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940), alleging that if the sellers had been sued by the plaintiff, they would have been liable in respect of the same damage by reason of their breach of the provisions of section 17 (2). In holding that the vendors were not liable, Finnemore J. said: "In my opinion, the fact that the owner or occupier of a factory is under a duty to fence adequately his machinery, and if he fails in that duty his employees—for whom, after all, he is responsible—may proceed against him in a civil action for damages, is no ground for supporting the proposition that the manufacturer and vendor of a machine required to be fenced by the Factories Act owes an analogous duty to those employees. In my opinion, the sole object of section 17 (2) is to prevent unfenced machinery from finding its way into factories, and the penalty prescribed by section 17 (2) is introduced to that end."

FRAUD: Principal and agent.

An interesting combination of the law of principal and agent and that relating to fraud is provided by the recent decision of the Court of Appeal in *Armstrong* v. *Strain and Others* [1952] 1 Q.B. 232. The facts were that Strain employed a firm of agents to find a purchaser for his bungalow. Skinner, a member of

that firm, thereupon made an innocent misrepresentation to the plaintiffs which was untrue and as a result of which they purchased the bungalow. Strain did not authorise Skinner, his agent, to make this misrepresentation and did not in fact know the statement was being made, but he did know the true facts which rendered it untrue, *i.e.*, if he had made it himself he would have been liable for fraudulent misrepresentation. The plaintiff contended that as principal and agent were one in law, fraud was thereby established. In rejecting this contention the court held that a principal cannot be made liable for fraud when there has been no element of fraud either on the part of himself or on the part of anyone for whose acts he is responsible.

CONTRIBUTORY NEGLIGENCE: Rule of " last opportunity."

The " last opportunity " rule which seeks to exculpate defendants from tortious liability where the plaintiff had the last opportunity of avoiding danger created by the initial negligence of a defendant, has been disapproved of in several recent cases—only to emerge again in different forms. A recent such emergence is illustrated in *Harvey* v. *Road Haulage Executive* [1952] 1 Q.B. 120, where the judge of first instance (Slade J.) absolved the defendants from liability where their lorry had been left projecting obliquely into a roadway on a foggy morning so that it was run into by a motor cyclist. Citing from the speech of Lord Shaw in *Anglo-Newfoundland Development Co., Ltd.* v. *Pacific Steam Navigation Co.* [1924] A.C. 406, 420, and from that of Lord Simon in " *Boy Andrew* " (*Owners of*) v. *Owners of S.S.* " *St. Rognvald,*" 1947 S.C.(H.L.) 70; 1948 S.L.T. 83, his Lordship held that assuming the lorry driver was at fault in leaving the lorry in a dangerous position athwart the road, nevertheless the negligence of the lorry driver created a static position which the plaintiff saw, and that after seeing it he could have avoided the impact by driving more carefully. The Court of Appeal reversed this decision. In the course of his opinion Denning L.J. said (when referring to the decision in the lower court and counsel for the defendant's argument in support thereof): " It seems to me to be a reversion to the doctrine of last opportunity which, as I have said before in *Davies* v. *Swan Motor Co.* (*Swansea*), *Ltd.* [1949] 2 K.B. 291, and I repeat now, is obsolete. It cannot survive the effect of the Law Reform (Contributory Negligence)

Act, 1945. No valid distinction can be drawn between negligence after seeing the danger and negligence in not seeing it. The only valid distinction in those cases is between conduct which is purposeful and reckless, and conduct which is merely negligent. If a motorist sees an obstruction in the road and purposely or recklessly runs into it, he can, of course, recover nothing, because it is wholly his own fault. But if he is merely negligent in not taking proper steps to avoid it, then the damage is the result, partly of his own fault in not avoiding the obstruction, but also partly the fault of the other person who left the obstruction in the road."

NEGLIGENCE: Duty of occupiers of premises and employers towards window cleaners.

Christmas v. *General Cleaning Contractors, Ltd. and Caledonian Club Trust, Ltd.* [1952] 1 Q.B. 141, does not decide any novel principle of law, but neatly illustrates the different duties owed by occupiers of premises and employers. An occupier contracted with a window-cleaning company to clean the windows of his premises once a fortnight. An employee of the company was standing on the outside sill, cleaning one of the windows, when the sash slipped knocking his hand from its hold and causing him to fall. He subsequently brought an action for damages against both the occupiers of the premises and his employers. The Court of Appeal held (affirming the decision of Jones J.) that the occupiers were not responsible for seeing that the window in question afforded a safe hold to the plaintiff. Although he was their invitee, the defect in the sash was, according to the evidence, not an unusual but a common recognisable danger of everyday experience to window cleaners against which the employing company must provide their own safeguards. This part of their Lordships' decision accordingly followed *London Graving Dock* v. *Horton* [1951] A.C. 737. The employers, on the other hand, were held liable as it was their duty, when sending employees to other premises, to take reasonable care to lay out the work carefully, to see that the premises were safe for their employees, or else to take proper steps to protect them from the dangers to which they were sent.

RECENT PRIVY COUNCIL CASES

Sultan of Johore v. *Abubakar Tunku Aris Bendahar and Others* ([1952] 1 T.L.R. 1106) was an appeal by the Sultan from a decision of the Court of Appeal, Singapore, dated November 1, 1949, which raised three main questions: (1) Was the Sultan to be regarded as a foreign sovereign who could not, without his consent, be impleaded in any of Her Majesty's courts; if so, (2) had he in the present case waived his immunity; and (3), if he had not, did that sovereign immunity extend to include the jurisdiction of the court in a case where proceedings were connected with his claim to be entitled to immovable property situated within the jurisdiction of the court.

FOREIGN SOVEREIGN: Immunity waived.

In substance, the litigation was in connection with a domestic dispute between the Sultan and his son (the first respondent) concerning which of them was entitled to receive the rents and profits of certain plots of land in Singapore. In form, it was an originating summons which the respondents, after the Japanese occupation had ended, took out under the Japanese Judgments and Civil Proceedings Ordinance, 1946, of Singapore, applying for leave to appeal against, or to set aside, a Japanese decree of June 18, 1945, which had been made in proceedings which the Sultan had instituted in May, 1945. By the decree it was held that the Sultan was the beneficial owner of the property in question. The Sultan issued a summons asking that the respondents' originating summons be set aside and all further proceedings under it stayed on the ground that the court had no jurisdiction over him as "a sovereign ruler." His summons was dismissed on the ground that, although at the material time the Sultan was a sovereign ruler, he had waived his immunity by instituting proceedings during the Japanese occupation. His appeal to the Court of Appeal was dismissed.

By section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946: "(1) Any party to the proceedings in which

a Japanese decree was made or given or any person aggrieved by such decree may . . . apply in the prescribed manner to the appropriate court for an order—(*a*) that such decree be set aside either wholly or in part; or (*b*) that the applicant be at liberty to appeal against such decree." The Board held that section 3 authorised the making of an application in the nature of an appeal from the Japanese decree; and that the procedure thereby authorised was not a new and distinct proceeding but a continuation of proceedings already instituted. The Sultan had been made respondent to the originating summons taken out by the respondents, a summons which was in substance an appeal in proceedings which, by reason of the ordinance of 1946, were a continuance of the very proceedings which he had himself instituted. He must accordingly be treated as having submitted to the jurisdiction in the current proceedings begun by the respondents, and, therefore, to have waived his immunity.

The third point did not in the circumstances call for decision. While the Board thought it would be wrong to express an opinion on an issue which did not now arise, they were unwilling to conclude their advice without making reference to one aspect of that controversy which was much canvassed before them. They stated that there had not been finally established in England (from whose rules the rules to be applied in the court at Singapore would not differ) any absolute rule that a foreign independent sovereign could not be impleaded in our courts in any circumstances. They discussed the meanings of the word "implead," and said that a great deal of the reasoning in *The Parlement Belge* (5 P.D. 197) would be inexplicable if there could be applied a universal rule without possible exception to the effect that, once the circumstance of a foreign sovereign being impleaded against his will could be established, a proceeding necessarily became defective by virtue of that circumstance alone. To say that was merely to disavow an alleged absolute and universal rule. It did nothing to throw doubt on the existence of the general principle. Nor was it necessary for their Lordships to express any opinion in the present case on the question whether, and, if so, to what extent, proceedings which concerned the title to immovable property within the jurisdiction formed an exception from that general rule.

In *Teper* v. *The Queen* ([1952] 2 T.L.R. 162) the appellant appealed by special leave from the verdict and sentence, dated February 7, 1951, of the Supreme Court of British Guiana (a judge sitting with a jury) whereby the appellant was convicted of arson of a shop with intent to injure and defraud, and was sentenced to seven years' penal servitude. The shop belonged to his wife, and in it the appellant carried on the business of a dry goods store. The Board stated that, on the charge of intent to defraud, the Crown's case was that the appellant, having insured the building and stock for sums considerably above their real value, set fire to them with the intention of claiming against the insurance companies.

HEARSAY EVIDENCE: Inadmissibility.

The grounds of appeal were that hearsay and incompetent evidence was admitted for the purpose of identifying the appellant as the man who set the premises on fire, that that evidence was in a high degree prejudicial to him, and that the other evidence against him was such that no reasonable jury properly directed could have convicted him on it alone, or at least that it was so flimsy and inconclusive that it must have been outweighed by the hearsay evidence in the jury's consideration of the evidence as a whole. The Crown's contentions were that the impugned evidence was properly admitted as part of the *res gestae*, that even if it was inadmissible the appellant suffered no real prejudice, and that the other evidence was amply sufficient to entitle a reasonable jury to convict. The impugned evidence, given by a police constable for the purpose of identification, was: " I heard a woman's voice shouting, ' Your place burning and you going away from the fire '; immediately then a black car " came from the direction of the fire and " in the car was a fair man resembling the accused." In cross-examination he said that he did not know who or where the woman was. She was not a witness at the trial. It was common ground that the incident took place at a distance of more than a furlong from the site of the fire, and that it happened not less than 26 minutes after the fire was started.

The Board stated that the rule against the admission of hearsay evidence was fundamental. Nevertheless, the rule admitted of certain carefully safeguarded and limited exceptions, one of which was that the words might be proved when they formed part of the *res gestae*. It was essential that the words

should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they were part of the thing being done, and so an item or part of real evidence and not merely a reported statement. The Board held that the words spoken by the woman did not form part of the *res gestae* and were not therefore excepted from the rule against hearsay evidence. It was the hearsay, and the hearsay alone, which gave dramatic force to the police constable's otherwise valueless evidence of identification and conferred on it a specious importance. The jury were directed that the evidence was inconclusive, but that it could be taken along with other evidence, and that, if from other facts the jury found that the accused was there, that evidence " tied up with it." The policeman's whole evidence was accordingly left to the jury's consideration to make of it what they could along with the other evidence. It was not necessary to decide what would have been the result if there had been a clear direction to disregard entirely the hearsay evidence. But the improper admission of that evidence was so prejudicial to the appellant, in a case where the rest of the evidence was weak, that the proceedings as a whole had not resulted in a fair trial. The test was whether on a fair consideration of the whole proceedings the Board must hold that there was a probability that the improper admission of hearsay evidence turned the scale against the appellant. No direction short of that stated above could avail to save the verdict, and the appeal succeeded.

NATIVE ORDINANCE: Jurisdiction of Courts.

Memudu Lagunju v. *Olubadan-in-Council and Another* ([1952] 1 T.L.R. 1297) was the appeal of Memudu Lagunju from an order of the West African Court of Appeal, dated December 4, 1948, made in proceedings in which the appellant claimed that he had been selected as the Timi (head chieftain) of Ede, in the Abadan District of Oyo Province, Nigeria, by the persons entitled by native law and custom to select the Timi. The respondents, the second of whom, J. A. Laoye, asserted that he had been selected as the Timi, both pleaded to the jurisdiction of the court without specifying the grounds of the plea. The Appointment and Deposition of Chiefs Ordinance, 1948, of Nigeria, provided by section 2: " (1) Upon the death . . . of any chief . . . the Governor may approve as the

successor . . . any person appointed in that behalf by those entitled by native law and custom so to appoint in accordance with native law and custom . . . (2) In the case of any dispute the Governor, after due inquiry and consultation with the persons concerned in the selection, shall be the sole judge as to whether any appointment of a chief has been made in accordance with native law and custom."

The Board heard argument on the question of jurisdiction only, and, on that question, the construction of the ordinance. They held that the provision in section 2 (2) of the ordinance of 1948 committed to the Governor exclusively the duty of judging whether an appointment had been made in accordance with native law and custom, and that the section absolutely and unconditionally excluded the jurisdiction of the courts to decide that question. The requirement that there was to be due inquiry and consultation with the persons concerned in the selection was not a condition precedent to the Governor's jurisdiction as sole judge or to the exclusion of the court's jurisdiction, but it was a condition of the Governor's valid exercise of his function as sole judge. If he came to a decision without having made due inquiry or without having consulted with the persons concerned in the selection there could be no doubt that in an appropriate action it would be competent for the courts to set his decision aside. But in no circumstances could the courts assume to themselves jurisdiction to decide that an appointment had or had not been made in accordance with native law and custom, and an action framed, as the present action was framed, to submit that question to the court's decision was incompetent.

Subsection (2) imposed two requirements, due inquiry and consultation. " Due inquiry " was not necessarily public inquiry, but it did imply that the parties to the dispute should be given an opportunity of being heard by the Governor as judge between them; and in intimating a decision under that subsection it was important also that the Governor should unambiguously declare that the appointment had (or had not) been made in accordance with native law and custom. The ordinance did not in terms impose that form in giving a decision, but the proper performance of the Governor's judicial duty required that there should be in a matter of such importance to the native population a clear public intimation that the judicial duty expressly laid on the Governor had been exactly fulfilled.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, b.a., ll.b., Advocate

EQUALITY BEFORE THE LAW

No idea is more difficult, observed Harold Laski, in the whole realm of political science than the concept of equality. At first sight it may seem that, by way of contrast, equality before the law is an idea which can be grasped fairly easily. Both the average layman and the average lawyer probably take it for granted as a principle which is usually acted upon, or ought to be, in a democratic society. But on closer examination its apparent simplicity is found to be deceptive. To Dicey equality before the law meant the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts, without any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.[1] In this respect Dicey has been criticised, on the ground that he did not take account of the special rights and duties of public servants or the immunities (at least in days before the Crown Proceedings Act, 1947) of government departments. In a lecture at King's College, London, which is printed in the *Law Quarterly Review* for April, 1952,[2] Professor H. G. Hanbury considers Dicey's thesis of equality before the law and suggests that as a universal maxim it is more calculated to mislead than to instruct. "Equality before the law is an ideal, towards the attainment of which we should strive, but it is far removed beyond our horizon by the manifold complications of life."

Three main cases of privilege are discussed by Professor Hanbury, privilege being defined by him as "a peculiarity which the law admits as attaching to persons in certain situations, and [one that] stiffens into a rule of law which exceptionally binds them, for good or for ill, in contradistinction to the rules under which normal persons live." The three main subjects considered are (a) the position of the Crown with regard to foreign affairs, including diplomatic privilege and the immunity of foreign sovereigns; (b) Crown privilege as to discovery of documents; and (c) parliamentary privilege. Dicey, however, was of course perfectly well aware of the various privileges of the Crown and the fact that public officials have special rights and duties. The point he was concerned to make was that these special powers "must be exercised in accordance with the ordinary common law principles which govern the relations of one Englishman to another."[3] Thus a factory inspector has peculiar powers conferred on him by Act of Parliament, "but if in virtue of the orders of his superior officials he exceeds the authority given him by law, he becomes at once responsible

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[1] *Law of the Constitution*, 9th ed., pp. 202–203.

[2] Vol. 68. p. 173.

[3] *Op. cit.*, p. 387.

for the wrong done," and further becomes amenable to the ordinary courts.[4] Equality before the law, then, does not mean that everyone is bound by the same rules, but that everyone is bound by the same principles of law, administered in the same courts.

Professor Hanbury's definition of privilege is not perhaps very helpful, for it is hard to think of anybody who is not privileged in his sense of the word. Are there not peculiarities attached by law to parents, children, motor drivers, landlords, tenants, doctors, dentists, solicitors, civil servants, shopkeepers, trade unionists, income-tax payers, soldiers, merchant seamen, hotel keepers, litigants, judges, lunatics and, it may be, professors? If these, and many others who might be mentioned, are privileged persons, where are the normal and unprivileged to be found? Words have no rational purpose when they are used in such a vague sense that they can convey any meaning at all. "Privilege" is derived from the Latin *privilegium*, which denoted a law inflicting penalties on a particular person, but the English word has come to mean something quite contrary, namely, an advantage belonging by operation of law, or otherwise, to a particular person or class of persons. It is misleading to use it in any other sense. A motorist is surely not privileged because he is liable to be fined if he drives at more than 30 m.p.h. in a built-up area. Moreover, the special powers which are exercised by certain persons like factory inspectors or policemen cannot be said properly to be privileges. An inspector of taxes, while he has the right, which other people have not, to demand all sorts of information about my income, derives no more advantage from obtaining the information than I do from complying with his demand. It is an abuse of language to say that a man is privileged because in the course of his duty he is called upon to exercise powers that other people lack. It is not the inspector of taxes, nor the Commissioners of Inland Revenue, but the national exchequer, that is to say, the State, that derives advantage from the powers which are possessed by the inspector of taxes.

The State, and to a lesser extent public authorities in general, are no doubt in a privileged position in many respects, but the principle of equality before the law can hardly be said to be infringed on that account, seeing that these privileges exist in order to further the interests of the community as a whole and do not give advantages to any individual over another individual. Equality before the law in the normal sense means equality between private persons, with the further qualification that they are adult and of sound mind. Even so, there are numerous inequalities, or privileges, left. For example, peers, diplomatic agents and tenants of rent-controlled houses possess privileges which cannot be explained away by any of the considerations just mentioned. How can this fact be reconciled with the general belief that on the whole equality before the law obtains in this country?

Probably one reason is that such legal privileges as exist are almost always to be accounted for either on the ground that the public interest requires them, as in the case of the privileges enjoyed by a member of Parliament, or because they are necessary in order to correct inequalities other than inequalities in law. If one man pays

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[4] *Loc. cit.*

nothing in direct taxes and another man has to pay fifteen shillings out of every pound of his income, that is not considered, presumably, by the majority of people to be inequitable, because progressive taxation is excepted as a desirable way of correcting inequalities of wealth. The more civilised a country is, or at least the more democratic, the more inequality in law is needed to make up for inequalities of nature or fortune. It follows that, so far from equality before the law being an ideal towards the attainment of which one should strive, as Professor Hanbury would have us do, it is truer to say that the greatest possible inequality before the law is the ideal, so long as equality in other respects cannot be attained.

In modern democratic societies privileges in the old sense of the word have practically disappeared. The new privileged classes are largely composed of the weaker and poorer members. But they are privileged all the same, and perhaps there is something more than just verbally paradoxical in the idea of multiplying legal inequalities in order to arrive at real equality. It would be all right if it were possible so to adjust the legal inequality as to make it exactly correlative to the real inequality. But that cannot be done.

The Rent Restriction Acts will serve as an example. The purpose for which rent control was introduced was to prevent landlords from taking advantage of their strong bargaining position, owing to a shortage of houses to let, by charging excessive rents or dispossessing their tenants in order to sell. But the shortage of houses, instead of being temporary, as was expected, has lasted for nearly forty years, and looks like continuing indefinitely. The consequence has been that tenants of houses to which the Acts apply have a permanent privilege conferred on them, from which numerous anomalies arise, and which, it may be argued, not only lowers housing standards but contributes to the housing shortage to which the legislation owes its origin.

Legislation may be a necessary, but it is often a crude, way of remedying social inequalities. For one thing, because it must be general in nature it tends to do justice to the majority at the cost of injustice to the minority; for another thing, to create privileges is to create vested interests, which are difficult to disturb even though the need for privilege has disappeared. The tenant of a privately owned house is tempted to regard his right to security of tenure and to a controlled rent as a natural right to which he is entitled whether the supply of houses is adequate or not. Obviously, much the more satisfactory manner of dealing with a housing shortage is to provide enough houses for everybody rather than to pass Acts like the Rent Restriction Acts, or in other words to increase real equality rather than to attempt to correct real inequality by the method of legal inequality. There is indeed a trend nowadays in this direction. The new National Health Service, for instance, is open to all, in contrast with the old system of national health insurance, which was available only to privileged persons. If complete real equality were possible, legal inequality would cease to be necessary. But that is inconceivable, even if the objective were limited to those inequalities that appear to be due to artificial, and not natural, causes.

The task of law in a democratic society, according to Professor Friedmann,[5] is to abolish the man-made, as opposed to the natural, differences between individuals, so as to allow each of them an equal opportunity of developing his personality. The trouble is that some men want to develop their personalities at the expense of others. To give them all an equal chance of doing so would be to allow the strongest and most unscrupulous to trample on their neighbours. That can scarcely be what Professor Friedmann desires. He means no doubt that every one should have an equal opportunity to develop his personality, provided he can do so without denying similar opportunities to others. This, however, involves criminal laws, companies Acts, factories Acts, progressive taxation and a host of other devices to protect the weak and the honest from those who are less weak or less honest.

Equality before the law, then, in the sense of equality of rights, must be interpreted to mean equality so far as consistent with the public interest and so far as inequality in law is not necessary in order to correct inequality in other respects. Equality before the law, however, connotes more than equality of rights, which is indeed quite a modern idea. The primary sense of the term is equality of treatment in law, which may obtain although great differences in rights exist between one class and another. But here again the principle of equality, however unexceptionable, cannot always be translated into practice. Reasons of public policy may make it necessary to discriminate between two persons who have committed similar offences, by treating one more severely than the other. Nor is it only a matter of public policy. Courts have wide powers to mitigate or remit penalties on grounds that seem good to them. It frequently happens that their choice of the appropriate method of dealing with a particular offender comes into conflict with the principle of equality of treatment, in which circumstances the principle may be disregarded. It is too ordinary an occurrence to arouse surprise for similar offences to be visited with different penalties. Criticism of the sentence imposed by a court is usual only if the principle of equality is departed from without apparently any reason, or still more, of course, if a bad reason is suspected.

Since equality before the law, whether in the sense of equality of rights or of equality of treatment, must be subject in practice to so many qualifications that the exception may seem as important as the rule, the question arises whether it is of much use as a principle at all, The answer surely is that its practical relativity does not in the least detract from its absolute value. The same consideration, after all, applies to other principles, whether of law or not. The usefulness of the concept of equality in law is not that it affords an infallible test for deciding whether a particular law is good or bad, or a particular rule has been justly or unjustly applied, but that it constitutes a standard, any departure from which needs to be justified by sufficient reason. What amounts to a sufficient reason can never be precisely laid down in advance, but it is not therefore merely arbitrary and subjective. Jurisprudence is well accustomed to the notion of the

[5] *Legal Theory*, 2nd ed., p. 450.

" reasonable man," a mythical person with different characteristics in different circumstances, yet far from a useless fiction. A sufficient reason is one that would appear good and sufficient to a reasonable man.

THE FORTUNATE FARMER

Among privileged classes of the community farmers occupy a fairly conspicuous place, although perhaps they are even more coy than other privileged persons about admitting it. However, they have no need to be apologetic. The importance of agriculture, together with the special features of the industry and its neglect in this country in the past no doubt justify exceptional treatment, and the substantial results achieved during the last ten years have done much to disarm criticisms. There are two principal ways in which the legislature has benefited the farmer, first by protecting him against the consumer through the system of guaranteed prices for his products, and secondly by giving him greater security of tenure and more ample rights to compensation as against the landlord. In return, he has accepted the obligation to maintain a reasonable standard of husbandry and to submit to a certain amount of supervision for that purpose. Supervision is exercised by the County Agricultural Executive Committees, which were set up by the Agriculture Act, 1947, in England and the corresponding Act of 1948 in Scotland. The Committees exercise administrative functions by delegation from the Minister or Secretary of State and have also judicial, or semi-judicial, functions which are of interest to lawyers.

Dr. R. M. Jackson, who is a member of the Cambridgeshire Agricultural Executive Committee, and chairman of the sub-committee which does most of the judicial work, writes on the subject in the *Law Quarterly Review* for July, 1952. The Committees are appointed, not elected bodies and are subject to close and continuous central control from an administrative point of view, but Dr. Jackson considers that they show many of the good qualities to be found in local government administration, and in efficiency and responsiveness to public need do not suffer in comparison with local authorities.

The most important part of the judicial, or semi-judicial, work of the Committees is the control they exercise over notices to quit. Such notices do not now become operative, where the tenant serves a counter-notice in the statutory terms, except with the consent of the Minister or Secretary of State. The general principle is that consent should be withheld unless the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of efficient farming, or unless greater hardship would be caused by withholding than by granting consent. Opportunity is given to the landlord and tenant to make representations before action is taken and the duty of receiving these representations and, in effect, of deciding between the parties has been delegated to the Committees.

Dr. Jackson describes the practice followed in dealing with a dispute. Representations may or may not be in writing, but in any event an oral hearing may be demanded, at which parties may appear in person, with relatives or friends, factors, solicitors and counsel, etc.

The hearing is private; there are no rules of procedure, witnesses are not examined on oath and the law of evidence does not apply; the chairman steers the proceedings as best he can without the assistance that a bench of justices of the peace receive from their clerk. The conclusion takes the form of a resolution passed by the Committee and reaches the parties as a decision of the Minister or Secretary of State, without reasons stated. Either party, if dissatisfied, can appeal, in England or Wales to an Agricultural Land Tribunal, of which there is one for each of the eight areas, or provinces, into which the country is divided, and in Scotland to the Land Court. In either case the decision is final on the question of consent to the notice to quit. The chairman of each of the English tribunals must be a barrister or solicitor of seven years' standing, and is appointed by the Lord Chancellor for a term of three years, which may be renewed. The other members are appointed *ad hoc* by the Minister from panels drawn up by organisations of farmers and owners of land and by the President of the Royal Institute of Chartered Surveyors.

A comparison between the English system of appeal from the Committees and the Scottish system would be instructive, and it is a pity that Dr. Jackson has not drawn it. No doubt he would have done so if he had read the authoritative article by Lord Gibson which appeared recently in the *Scottish Law Review* [1] on the Scottish Land Court and Recent Changes in Agricultural Law. But in Cambridgeshire they do not appear to have yet heard of the existence of the Scottish Land Court. There is no systematic reporting of the decisions of the Agricultural Land Tribunals, which, like those of the Committees, are not reasoned, although apparently the chairman of one of the Tribunals has adopted the judicial practice of giving an oral judgment. There is no provision for an appeal to the High Court by way of stated case on a point of law, as of course there is from the Land Court to the Court of Session, and no other provision to ensure that the eight tribunals adopt consistent principles. Dr. Jackson criticises the absence of an appeal from the Tribunals and thinks that there should be provision for frequent consultation between the chairmen, but otherwise seems to regard the system as satisfactory. It may be that agriculturists in England agree with him. If so, they are rather easily contented.

As Lord Gibson points out, decisions of the Land Court are immediately circulated to all the Agricultural Executive Committees in Scotland, enabling them to see how the court has dealt with appeals, and the reasons for the decisions, and this has contributed to the harmonious working of the new legislation. Practitioners are assisted also by the series of reported cases. It is difficult to understand how in England either solicitors or the Committees can have any clear notion what guiding principles, if any, are being laid down and why, or how landlords and tenants can be advised what view a tribunal is likely to take. No doubt the public is so accustomed nowadays to being left in the dark by administrative tribunals of one kind or another that it will put up meekly with almost anything. As for the right of appeal by stated case, although its omission from the English legislature is

[1] See *Scottish Law Review*, vol. 68, for April, May and June, 1952.

no doubt a defect, it cannot be regarded as a substitute for a central court of appeal. There is, indeed, little room for appeal on a ground of law in notice to quit cases. It is remarkable that not a single appeal has reached the Court of Session from the Land Court under the 1948 and 1949 Acts, in spite of the fact that a variety of matters come before the Land Court by virtue of these Acts, both directly and indirectly.

The duty of enforcing against farmers and landowners their obligation to maintain proper standards of cultivation and estate management is carried out in the first place by serving a supervision order, or warning notice, on the occupier or owner as the case may be. The notice is followed by directions as to methods of farming or estate management, and in the last resort by dispossession. It is explained by Dr. Jackson that placing under supervision is not in practice considered until friendly advice and persuasion have been tried and have failed. At least two members of the Committee, in the case of a farmer, inspect the farm, and, if a prima facie case is then thought to exist, the farmer is informed of the proposal to issue an order and of his right to make representations. If he wants an oral hearing this takes place before the Committee and in effect he has to show cause why an order should not be made. The order having been made, the next step is to inform the farmer of the directions which it is proposed to make. He can again submit representations, either in writing or at an oral hearing, but the directions when made are binding on him, and contravention of them is a criminal offence. This sanction is, however, rarely invoked, the effective sanction being dispossession, against which he has a right of appeal to an Agricultural Land Tribunal or to the Scottish Land Court. The idea of the Acts is that the inefficient farmer should as far as possible be led into better ways, and it is only after attempts to improve him have clearly failed that the drastic remedy of dispossession is contemplated.

How well does the system of supervision work? Dr. Jackson admits that it gives rise to a number of difficulties. It is not easy to assess whether or not a man is making a substantial improvement in his farming methods, and the various stages of supervision and direction may well take so long that the season for some operation has already passed, and the Committee incurs criticism for its supposed slackness. He also significantly remarks that there have been far fewer supervision orders than some people expected. He might, perhaps, have added that there have been far fewer than some people think there ought to have been. But that is not unnatural. It is one thing to look over a hedge at a neighbour's field and criticise the number of weeds growing there. It is quite another to condemn him officially as a bad farmer, unless his shortcomings are too notorious to pass over. If a committee consisting of members of the legal profession were appointed with power to place any firm of solicitors under supervision on the ground of inefficiency, and to give directions as to the carrying on of its business, how many supervision orders is it to be expected that the committee would pronounce? It is rather ingenuous to suppose that methods of farming and estate management are likely to be altered to any very great extent by provisions of this type. The surer way to increase the efficiency of agriculture, like other industries, is not to rely on exhortations, or statutory penalties, but to offer

incentives on the one hand and to make it unprofitable on the other hand for bad farmers to continue farming. Recent legislation has been more successful, perhaps, in encouraging good farming than in discouraging bad farming. The existing occupier, whether tenant or owner, has been given a measure of security which leads to consequences that may not have been foreseen and are not in all respects of advantage to agriculture. It is now difficult, as Dr. Jackson says, to find a farm that is to let, and they are very expensive to buy on the rare occasions when they are offered for sale, so that there is some danger of agriculture becoming a hereditary occupation rather than a competitive industry.

RECENT LITERATURE

The Quest of Justice. By Harold Potter, LL.D., Fellow of King's College, London, and Professor of English Law in the University of London. London : Sweet & Maxwell, Ltd.

Professor Potter here reproduces three lectures he gave in public at King's College, London. Their object is to extract certain points or tendencies inherent in English legal history as regards justice. This is a difficult task because the conclusions have to be drawn from rather particular incidents in English history, whose relevance would not be obvious to many but the trained student in English law, though probably these formed a considerable proportion of the audience to whom the lectures were delivered. How recondite they seem to those not so trained ! Incidentally one is intrigued to find a note stating baldly that " a union valid in Scotland may be invalid as a marriage in England." What union is that ? Has he unearthed some strange form of concubinage amongst us ? On the other hand, Professor Potter protests against the insertion of adjectives to justice, such as " social justice " or " democratic justice " when reflection suggests that a contrast rather than limitation is really meant. Justice is justice, fully or not at all. The author goes on to examine how law should not be stretched to cover the whole field of justice with its moral and religious implications. He selects four periods in English legal history which exemplify how in each case procedure and principle have reached out practically to this end. These he classifies as the ages of justice's dawn, of faith, of reason and, perhaps a little cynically, of hope. A further examination would no doubt connect them up with the sociological aspect of law, which should, perhaps, not be ignored. Professor Potter concludes with a thoughtful examination of how far modern administration should attempt to relate itself to legal foundations and how far it is on dangerous ground when it pretends to do so when it is inappropriate. His death since the publication of this work will unfortunately prevent us learning in more detail how he would elaborate the subject in a longer work.

The Commonwealth of Australia: The Development of its Laws and Constitution. Under the General Editorship of G. W. Paton, M.A., B.C.L., with Specialist Editors. The British Commonwealth: The Development of its Laws and Constitutions. Under the General Editorship of George W. Keeton. Volume 2. 1952. London : Stevens & Sons, Ltd. Price £2 15s. net.

The Republic of India. By Alan Gledhill, M.A., I.C.S. (retd.), Barrister-at-Law. The British Commonwealth : The Development of its Laws and Constitutions. Under the General Editorship of

George W. Keeton. Volume 6. 1951. London: Stevens & Sons, Ltd. Price £2 5s. net.

These are the first volumes to be published of a work which is designed to present a general survey of the Laws and Constitutions of the Commonwealth. The volume on Australia describes the reception of English Law, the Constitution of the Commonwealth and the development of the law under the impact of legislation. The basic uniformity with English Law is stated and the book directs attention to the spheres in which the law has developed on different lines from English law due to the special conditions in Australia. It is interesting to note the different problems which have arisen and the different solutions which have been found. To take one example, the Torrens system of conveyancing, which provides a certificate of title guaranteed by the State, seems to have achieved a high degree of certainty of title and simplicity of conveyancing. The different grounds of divorce and the problems of divorce jurisdiction, which arise in a federal constitution are dealt with and are of interest at the present time. The volume assumes in the reader a knowledge of English Law, but on that basis gives a detailed account of the law and constitution of Australia.

The volume on India describes the new Constitution of the Republic of India and the body of law now in force there. It also gives a survey of the development of the Government of India from the time of the East India Company. The Constitution of India is elaborate and full of interest. Its method of dealing with the fundamental rights of the individual by a combination of rights enforceable by the courts, and directive principles of State policy which are not enforceable, is interesting and uncommon. There is a full and detailed description of the body of law in force in India. The whole volume is written by the one author and probably for that reason seems to have a closer unity than the volume on Australia which has several specialist contributors.

These volumes cover ground which is unfamiliar to a Scots lawyer, but to a student of the Constitutions of the Commonwealth and to one interested in comparative law they offer a fruitful field for study.

E. J. Keith.

Morals and Law : The Growth of Aristotle's Legal Theory. By Max Hamburger. 1951. Newhaven : Yale University Press. (London : Geoffrey Cumberlege. 1952.) pp. xxii + 191. Price 24s. net.

The Foreword by Dr. Huntington Cairns, emphasising Aristotle's grasp of legal principles and of the place of law in the social structure as a whole, puts concisely the position Dr. Hamburger supports by a wealth of learning and a carefully documented exposition of the legal theory contained in the *Magna Moralia, Eudemian Ethics, Nicomachean Ethics, Politics* and *Rhetoric.*

Part I, on voluntary action and choice, covers Aristotle's examination of the assumptions underlying legal liability in which he draws attention to the main distinctions now recognised and, in the course

of his argument, provides a definition of negligence which is "the stock-in-trade of every lawyer in the western world" (p. 26).

Part II, on law and justice, explains Aristotle's advance on the position of his predecessors. The importance he attached to what we call "the rule of law" led him to a much more penetrating analysis of the conception of justice than we find in Plato. He has much of interest to say on "natural law" and its relation to "positive law," was aware of some of the difficulties of natural law doctrine to which Kelsen has directed attention; and there are some suggestions that he was moving to—but did not quite reach—a position which would interpret "natural law" as a set of rational principles infusing and directing the development of positive law (pp. 59–65). In this connection his discussion of equity is significant. Dr. Hamburger shows (pp. 89–105) that, though Aristotle did not identify the notions of natural law and equity, he came to view them as closely akin, and—to this extent—to replace the conception of a body of eternal law by that of an eternal principle or end directing the administration of law as it exists at any given time.

Within the range of positive law, the distinction between custom and statute is discussed; and there is, of course, the famous differentiation of "distributive justice" (broadly speaking, the principle on which a system of rights and duties is created) from "remedial or corrective justice" (concerned with the maintenance of such a system in face of attempts at infringement). Within the field of remedial justice Dr. Hamburger seems to confirm what students of the *Nicomachean Ethics* suspect, namely that Aristotle was not too clear on the distinction between civil and criminal process, possibly because the whole issue is obscured by his conception of "reciprocity" which appears to confuse principles of economic exchange with a retributive theory of punishment (pp. 47–53). On the other hand, the main concepts of civil law seem all to be noted. English lawyers have Aristotelian support for the distinction between actions of contract and actions of tort, and Scots lawyers for the distinction between delict and quasi-delict.

In Part III Dr. Hamburger is particularly helpful in putting into perspective Aristotle's account of "friendship"—familiar to most of us as covered in Books VIII and IX of the *Nicomachean Ethics*. Friendship (in Aristotle's sense of the term) is important not only in private relations but also in every healthy political society. The full meaning of the term is not easy to convey, but it includes respect for persons and devotion to common goods. In its highest form it is one of the twin pillars (respect for the law of the State being the other) on which alone the arch of an equitable social order can be erected. It governs good relations between "equals" and "unequals," rulers and subjects, partners, husband and wife, parent and child, master and slave.

At the end of this Part there is a brief account of Aristotle's influence on subsequent legal theory and practice.

It is not to be expected that an account of Aristotle's legal theory should open new lines of juristic thought. The basic ideas are all familiar; and perhaps the chief interest of Dr. Hamburger's book to those not specially concerned with historical origins will be in finding

that there are these origins, deep-rooted in ancient thought, of familiar working principles. In this sense Dr. Hamburger would probably agree that it is—at least directly—the select band of legal historians to whom his work will be most valuable. To others, indeed, the plan of his book is not wholly advantageous. In trying to trace the growth of Aristotle's legal theory one is confronted by the unsettled controversy as to the order of Aristotle's works and which ones are genuinely his. This has forced Dr. Hamburger to intertwine the threads of a double argument, one strand concerned with Aristotelian "higher criticism" and the other with the exposition and evaluation of juridical theory. It is difficult to see what else he could have done, and it may be taken for granted that his contribution to the literary controversy has special significance just because he has brought to it a method of assessing evidence which could be employed only by a person with the requisite classical and juristic learning. It is therefore no criticism of the work to suggest that those whose interests lie in systematic legal doctrine rather than in the intricate questions of early origins will find the arrangement of the book somewhat distracting in the attempt to appreciate the essence of Aristotle's mature views.

The other main difficulty confronting Dr. Hamburger is, of course, that the legal theory has to be picked out from Aristotle's works on moral and social philosophy generally—an inevitable consequence of the great merit of Aristotle's approach, inasmuch as he saw the problems of jurisprudence in the context of a whole ethical and political philosophy and was not tempted into the undue abstractions of which our more specialised age is frequently guilty. Dr. Hamburger skilfully throws the theory of law into relief and at the same time keeps us continually aware of the ethical and political background.

W. D. Lamont.

Law in the Making. Fifth Edition. By Carleton Kemp Allen, M.C., K.C., D.C.L., 1951. Oxford: at the Clarendon Press. Price 35s. net.

This is really the first remaking by Dr. Allen of his classic since 1946, as that of 1948 was more of a reprint than an overhaul. Much has happened since its first appearance in 1927, and it now extends to over 600 pages. It still retains its main thesis as well as its readable style. The expansion is not so much in respect of the philosophical as of the contemporary history. The author points out in the Preface that, although incidental changes have been made, the elaboration here is mainly in regard to two matters. Dr. Allen believes that there has been a swing over in regard to the doctrine of precedent. This is in the direction of flexibility, in getting rid of the sacrosanctity of every precedent and of the mere *ipsissima verba* thereof. He would not object to its going even further as long as it does not destroy the continuation of the valuable albeit peculiar service which it has performed in English legal history, though as with many eminent writers, it does not occur to him to see if Scots law is proceeding on parallel lines. Perhaps he presumes that it does and we have not had much discussion to suggest any different conclusion. The other subject

where rewriting has taken place is as regards administrative law and subordinate legislation. This was of course inevitable in a period when these form one of the great unsolved problems. Dr. Allen stands on the side of courts with an administrative jurisdiction, though he counters Professor Robson's preference in that for a preponderance of lay personnel and the discarding of pre-eminently legal procedure. In general, the reader will share the author's pleasure in finding in his pages a vital element which ensures that the work is not " dated."

S. G. KERMACK.

Stroud's Judicial Dictionary of Words and Phrases. Third Edition in Five Volumes. General Editor, John Burke, Barrister-at-Law; Assistant General Editor, Peter Allsop, M.A., Barrister-at-Law. Vol. I, A—D; Vol. II, E—L. 1952. London : Sweet & Maxwell, Ltd. Price £3 15s. net per volume.

In the course of a racy Preface the learned General Editor remarks " *Stroud* has embedded in it a considerable amount of Scottish law. This has been left alone because the present editors do not understand Scottish law." The present reviewer does not understand English law and should, therefore, on the same reckoning, limit his comments.

It is important to realise that *Stroud* is a dictionary of words and phrases which have received interpretation by the judges, and the usefulness of such a work needs no emphasis. Even in Scotland *Stroud* has become well known and those who throughout the past sixty years have referred to it for enlightenment on the unfamiliar terminology of English law will welcome the appearance of this new edition. But the Scottish lawyer should not confine himself to such limited use. As has been mentioned, he will find much Scottish law, and he may find guidance on expressions judicially interpreted in England which have not been before the Scottish courts. After all basically the same language is spoken on both sides of the Border !

Manual of German Law. Volume 2 : Private International Law, Civil Procedure, Criminal Law, Criminal Procedure. A Foreign Office publication. 1952. London : H.M. Stationery Office. Price £1 1s. net.

This is the second volume of the *Manual of German Law* published by the Foreign Office and designed as an elementary guide for members of the British staff in the British Zone of Germany. The first volume, which was published last year, contained a general introduction and dealt with the Civil and Commercial Law of Germany. This second volume covers four topics—Private International Law, Civil Procedure, Criminal Law and Criminal Procedure, the articles being written in clear and interesting style by legal scholars, Messrs. E. J. Cohen, G. Meyer and K. Neumann.

The book is valuable not only as an exposition in broad terms of the law at the present time in Western Germany but as a study in comparative law, which is probably its most important aspect. The

comparisons made in the book are with the law of England. Each article begins with a brief historical introduction, which shows the amendments, in places revolutions, which were made by the Nazis, chiefly in the sphere of criminal law and procedure. A short bibliography is given as an appendix to each article, though it is pointed out that many of the larger works on Criminal Law have not yet been republished in new editions. The volume ends with a List of German Legal Terms, supplementary to that given in Volume 1.

In the field of Private International Law resort is required more than in any other branch of the German Law to the opinions of modern writers, for much of the field is not covered by statutory rules, and the German lawyer does not follow Savigny. German Conflict of Laws does not include the limits of jurisdiction of the courts and also the rules as to acquisition and loss of nationality and the treatment of aliens. Interesting points are the recognition of the doctrine of *renvoi*; the adoption of the law of the nationality for all questions of status, and many questions of succession and in the law of domestic relations, though whether a person has the nationality of a foreign country is determined by the law of that country : *cf. R.* v. *Lynch* [1903] 1 K.B. 444; and the determination of the nationality of stateless persons, those tragic figures of the last 15 years, by the law of their residence. Foreign judgments are recognised if there is reciprocity by the foreign State but there is this important qualification that the foreign judgment must not have deviated to the detriment of a German party from certain fundamental rules of the German Conflict of Laws. A German court must make the judgment for enforcing the foreign decree and it will do so without examination of the foreign judgment. No foreign judgment in favour of a non-German creditor can however at present be enforced without permission under Military Government Law.

The field of civil procedure will probably prove of most interest to the general practitioner. Here the various differences which had grown up in zones and localities since 1945 have now been ironed out by a Federal Law so that once again there is uniformity in Western Germany. The book contains an interesting illustration of the progress of a case before a District Court, including the pleadings, court minutes, and the judgment of the court. In this field the comparative lawyer notes with interest the position of the judge. His status is much lower than in this country—he is addressed in court much more familiarly—and to become a judge is to begin a career, not as here to receive a reward at the end of one. But a judge's duties are much greater and include what in England would be done by Masters and Registrars and hence there are far more persons occupying the positions of judge in Germany than in this country. There are special courts for constitutional and administrative law questions, including revenue law.

In striking contrast to this country, the oral hearing of a case in the courts plays a minor and sometimes formal part, for the written pleadings contain at length the arguments in the law, as was once the case with us, details of the evidence, etc., and the judge has himself studied the file of papers before the hearing—a reform which is being considered by the Procedural Committee in England. The examination of the witnesses is by the judge, though by leave the parties may

ask further questions. Hence the hearing takes much less time, and litigation is cheaper, even though court fees are higher and continuations are common.

While legal representation is not required before local courts, it is necessary elsewhere; and the attorney must produce his written authority to act (a rule that once operated in Scotland—see, for example, *Regiam Majestatem*), but the client must be allowed to speak also if he so requests.

Legal aid is given to a poor litigant by the court trying the case if the litigant is shown to be unable to pay the costs of proceedings without endangering the maintenance of himself and his family and if his case is not unreasonable.

The law of evidence is brief for the court is left an unfettered discretion in its appreciation of it and the main topics are the burden of proof and the kinds of evidence. So far as foreign law is concerned, this is obtained by the court not from foreign experts but from books, periodicals, or an embassy or a university institute.

Criminal Law is dealt with, first, as to the structure of the criminal code, then as to the concept of crime in general and, thirdly, as to specific crimes. There is an interesting division of crimes in German Law into serious; of moderate gravity; and petty—distinctions, based on the punishments permitted, that are important in questions of attempted crimes and the doctrine of prescription or limitation. An attempt to commit a petty offence is never a crime and attempts at those of moderate gravity are offences only if expressly made so. Again it is now held by the courts that an attempt to commit a serious offence against an unsuitable object, *e.g.*, to procure abortion on a non-pregnant woman, is punishable if the actor has considered the object suitable—*cf. H.M. Advocate* v. *Anderson*, 1928 J.C. 1, and *H.M. Advocate* v. *Semple*, 1937 J.C. 41. The doctrine of *R.* v. *Bourne* [1939] 1 K.B. 687, is applied in suitable cases. One notes too with interest the crimes of adultery; of defamation (including where the libel is published only to the defamed person)—a common crime apparently; of failure to give aid in case of an accident or a public danger or emergency; of incitement to class war in a manner likely to cause a breach of the peace—*cf.* Public Order Act, 1937; and of dangerous self-induced intoxication, an offence that requires the commission of some act which is a punishable offence. It is a mitigation of theft if the crime was motived by want, which is held to mean that the culprit is unable to earn the means of subsistence by honest work for himself or his children, though want which affects the whole population does not come into that category.

As one would expect, the post-war law regarding crimes against humanity is dealt with and the author points out the difficult questions raised by the vague and wide scope of such offences, including the problem of the constitution of the offence by the decision of the court in the course of the administration of justice—a problem of *ex post facto* law that has provoked much controversy among lawyers in this country and elsewhere.

German Law makes provision for the preventive detention of habitual criminals but the sentence as a rule bears no limit of time.

In contrast to the system in England but bearing some analogy to the position in Scotland, a criminal trial can only take place after there has been a preliminary investigation *in camera* either by the public prosecutor or a magistrate.

In both the spheres of civil and criminal law the rule of *stare decisis* is generally not adopted, previous decisions of a superior court being followed only from regard to that court and not by force of any legal obligation or principle. The authors merely state the law, and the wisdom and the value of the German practice are not commented upon or discussed.

The volume is well set up and, apart from one or two small printing errors, the only criticism one can make is that some of the references might with advantage to the reader have been put in the form of footnotes. The book is to be commended, and the authors congratulated upon their clarity.

G. Campbell H. Paton.

Wurtzburg's Law Relating to Building Societies. Tenth Edition by John Mills, Barrister-at-Law, assisted by Bryan J. H. Clauson, Barrister-at-Law. 1952. London : Stevens & Sons, Ltd. Price £2 2s. net.

The building society has in the present century become one of the commonest institutions in the country and the volume of deposits and business transacted grows every year. Since 1874 building societies have accumulated round themselves a considerable volume of statute law and a modest number of decisions. Both are to be found in *Wurtzburg*. This body of law is of importance particularly to the officials and advisers of societies, but hardly less so to every conveyancer in the country, as transactions which involve building societies occur with great frequency, though Scottish conveyancing textbooks make no reference to the matter. This tenth edition of the standard, indeed the only reliable, modern book on the subject, has been substantially revised and rewritten. It caters particularly, of course, for the building society official rather than the conveyancer and deals fully with the formation, powers, and working of such a body. The relevant statutory material which is common to Scotland and England is collected in a hundred pages of appendix. The Scots lawyer will be gratified to find Scottish decisions cited and it is really only the chapters on mortgages which must be treated with reserve. These are written from the English standpoint but many of the sections, such as on interest and repayment, cannot be ignored. This edition will certainly maintain the position and value of this useful book.

D. M. Walker.

Carver's Carriage of Goods by Sea. Ninth Edition by Raoul P. Colinvaux, Barrister-at-Law. 1952. London : Stevens & Sons, Ltd. Price £6 10s. net.

That *Carver* is a classic is now beyond doubt and having regard to the substantial developments in shipping law since 1938 a fresh edition would in any case have been welcome. The learned editor of

this edition has, however, done a good deal more than merely revise the footnotes. In the first place he has followed the unusual course of taking as his text not the last edition but the fifth, which was edited in 1909 by a young barrister who is now Lord Wright : on this basis he has constructed a substantially bigger, fuller and more complete *Carver*. The text has been conveniently broken up by black and italic sub-heads, important statutory phrases under discussion are in black type, and cases cited in full are in smaller type : one conspicuous change to be even more strongly commended is the disappearance of references to sections and the substitution of reference to pages.

The additions made to the text are numerous, substantial and valuable : there are very many additional cases, including many leading American ones, though in relation to these one must bear in mind the warnings of Lord Wright in *The Monarch Steamship Case* 1949 S.C. (H.L.) 1, 27; [1949] A.C. 196, 231, that even in shipping law, where American law and our own run very close, too much reliance should not be placed on a judgment proceeding from the background of a different legal system : then there is in place of the previous rather scanty treatment a long and detailed discussion of and critical commentary on the Carriage of Goods by Sea Act, 1924, which deserves a place alongside *Scrutton on Charterparties* as the *locus classicus* on that topic. Another new feature is a completely new chapter on frustration of contracts and illegality, which is singularly appropriate since so much of the law on this matter has been developed in shipping cases : this is furthermore one of the best discussions of the matter we have seen.

Much more has been rewritten and expanded : thus measure of damages, seaworthiness and negligence, deviation and delay, all receive increased attention, and many of the words and phrases commonly found in shipping documents are considered under the topic of construction of the contract. By no means least is the fact that the index with *page*-references is much improved and amplified.

The appendices now include not only the 1924 Act but The Hague Convention on which it was based, Commonwealth legislation pursuant thereto, the corresponding United States Act and the revised York-Antwerp Rules of 1950.

So much for what has been done to *Carver*; as to how it has been done examination leaves it beyond doubt that the revision has been thorough and accurate. Account is taken of authority, including Scottish authority, down to the end of 1951 and the later cases have been properly incorporated into the text. The publishers make bold to claim that this is the best edition yet of *Carver*, a view with which we would agree.

D. M. Walker.

The Colleges and the Courts, 1946–50. Judicial Decisions regarding Higher Education in the United States. By M. M. Chambers. With a Foreword by Edward C. Elliott. 1952. New York : Columbia University Press (London : Geoffrey Cumberlege). Price 20s. net.

The sub-title of this book is *Judicial Decisions regarding Higher Education in the United States.* It is the third quinquennial review

of such decisions in supplement of the author's original work published under the same title in 1936. This volume is founded on the 190-odd decisions drawn from some 40 jurisdictions in the United States decided during the post-war period and having some bearing on academic matters. In some cases the relevance of the cases to education is tenuous and in many cases no point of any legal interest seems to have been decided. The book is in substance a digest of these cases considered in a non-technical light and grouped under the main heads of staff and students, status of colleges, private institutions and the states, taxation questions, and property and trust questions. The slender amount of legal principle involved in many cases leads to some difficulty when the author seeks to deduce the general trends discernible in the period as he does in the introductory chapter. Some of these deductions appear well founded, such as that racial segregation in education is breaking down : four Supreme Court decisions point this way. On the other hand the continuing tendency to uphold the validity of charitable trusts for education is hardly a noteworthy legal conclusion. Nevertheless to American University administrators the cases collected should prove of considerable value.

To the British reader, however, different aspects may appear more interesting. Thus from these cases one can see the actual difficulties arising from racial segregation of negroes and some of the (to us) remarkable consequences of having to contend with a written State constitution. Again one cannot quite conceive of a British University setting out to finance new buildings by the issue of bonds. On the other hand charities for educational purposes and *cy-près* schemes apply in very similar fashion and the question of what is a " charity " for the purposes of exemption from taxation is a thorny question in America too. It is more from this comparative angle that this book is of interest in Britain.

D. M. Walker.

Economic Aspects of Sovereignty. By R. G. Hawtrey. Second Edition. 1952. London : Longmans, Green & Co., Ltd. Price 24s. net.

This book makes disturbing reading. It commences with the economic exploitation of land, the badge of sovereignty, and ends with an eloquent plea for the existence of a supra-national authority created to enforce peace. What has this to do with law? A great deal if you accept the view that law is the technique which makes the political art effective, for control of material resources carries with it political control, and the latter calls the tune to which, in the last resort, law must dance. But the value of this work lies in the unexceptionably lucid exposition it gives of the causes underlying present world-wide unrest. If the author's thesis is correct, and it seems unassailable, that power can never remain *in equilibrio*, and that rivalry in power is itself a cause of war, then, assuredly nothing short of an effective supranational authority (which UNO is not) can avoid World War III. To him who seeks understanding this book is indispensable.

J. J. Gow.

OTHER PUBLICATIONS RECEIVED

(A later review is not precluded, especially where books are received shortly before going to press.)

Notable American Trials—

Prisoners at the Bar: An Account of the Trials of William Haywood, Sacco and Vanzetti, Loeb and Leopold, and Bruno Hauptmann; and

Guilty or Not Guilty? An account of the Trials of Leo Frank, D. C. Stephenson, Samuel Insull, and Alger Hiss.

Both by Francis X. Busch. 1952. Indianapolis and New York: The Bobbs-Merrill Company, Inc. Price $3.50 each.

Urban Conditions in Africa: Select Reading List on Urban Problems in Africa. Compiled by J. Comhaire, D.JUR.(Bruxel.), D.PHIL.(Oxon). 1952. Published for the Institute of Colonial Study by Geoffrey Cumberlege, Oxford University Press, London. Price 4s. 6d. net.

Cases on Church and State in the United States. Compiled by Mark De Wolfe Howe. 1952. Cambridge, Mass.: Harvard University Press (London: Geoffrey Cumberlege). Price 40s. net.

Civil Liberties Under Attack. By Henry Steele Commager, Robert K. Carr, Zechariah Chafee, jr., Walter Gellhorn, Curtis Bok, and James P. Baxter, III; Clair Wilcox, Editor. 1951. Philadelphia: University of Pennsylvania Press (London: Geoffrey Cumberlege). Price 28s. net.

Justice. By Professor Giorgio del Vecchio. Edited by Professor A. H. Campbell. 1952. Edinburgh: Edinburgh University Press. Price 30s. net.

Guide to League of Nations Publications. A biographical survey of the work of The League, 1920 to 1947. 1951. New York: Columbia University Press (London: Geoffrey Cumberlege).

Preparing College Men and Women for Politics. By Thomas H. Reed and Doris D. Reed. 1952. New York: The Citizenship Clearing House, affiliated to The Law Center of New York University.

The Law of Income Tax. Twelfth Edition. By E. M. Konstam, Q.C. 1952. London: Stevens & Sons, Ltd; Sweet & Maxwell, Ltd. Price £4 10s. net.

The Principles of Income Taxation Deduced from the Cases. By J. P. Hannan, LL.D., and A. Farnsworth, LL.D., PH.D. 1952. London: Stevens & Sons, Ltd. Price £3 3s. net.

The Law relating to the Architect. By E. J. Rimmer, B.SC., M.ENG., A.M.I.C.E., Barrister-at-Law. With a chapter on The Registration and Professional Conduct of The Architect by Pembroke Wicks, C.B.E., LL.B., Barrister-at-Law. 1952. London : Stevens & Sons, Ltd. Price 35s. net.

Principles of Administrative Law. By J. A. G. Griffith, LL.M., and H. Street, LL.M., PH.D. 1952. London : Sir Isaac Pitman & Sons, Ltd. Price 30s. net.

Current Research in International Affairs. A Selected Bibliography of Work in Progress. With an Introduction by Frederick S. Dunn, Center of International Studies, Princeton University. 1952. New York : Carnegie Endowment for International Peace.

Parliament : A Survey. Edited by Lord Campion. 1952. London : George Allen & Unwin, Ltd. Price 22s. 6d. net.

Justice According to Law. By Roscoe Pound, formerly Dean of the Harvard Law School. 1952. Yale University Press (London : Geoffrey Cumberlege). Price 16s. net.

The Law List 1952. Edited by Leslie C. E. Turner. Published, so far as relates to certificated solicitors practising in England and Wales, by the authority of The Law Society. 1952. London : Stevens & Sons, Ltd. Price 25s. net.

Précis de Droit International Privé. III. Second Edition. By P. Arminjon and Arnold Schloepfer. 1952. Paris: Libraire Dalloz.

Theft, Law and Society. Second Edition. By Jerome Hall. 1952. Indianapolis: The Bobbs-Merrill Company, Inc.

Le Conseil d'Etat. Livre Jubilaire publié pour commémorer son cent cinquantième anniversaire. 1952. Paris : Recueil Sirey.

The British Cabinet System. By Arthur Berriedale Keith, D.C.L., LL.D., D.LITT., F.B.A. Second Edition, by N. H. Gibbs. 1952. London : Stevens & Sons, Ltd. Price 37s. 6d. net.

The Elements of Roman Law. With a translation of the Institutes of Justinian. By R. W. Lee, D.C.L., F.B.A. Third Edition. 1952. London : Sweet & Maxwell, Ltd. Price 30s. net.

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Pollock on the Law of Partnership. Fifteenth Edition. By L. C. B. Gower, LL.M. 1952. London : Stevens & Sons, Ltd. Price 25s. net.

Shona Customary Law : With reference to Kinship, Marriage, the Family and the Estate. By J. F. Holleman, M.A., PH.D. 1952. Capetown : published in association with the Rhodes-Livingstone Institute and the Beit Trust, by Geoffrey Cumberlege, Oxford University Press. Price 42s. net.

Constitutions and Constitutional Trends Since World War II : An Examination of Significant Aspects of Post-war Public Law with particular reference to the new Constitutions of Western Europe. Edited by Arnold J. Zurcher. 1952. New York University Press (London : Geoffrey Cumberlege). Price 40s. net.

JURIDICAL REVIEW

EARLY SCOTTISH STATUTES REVISITED

WHEN in 1861 Sir Henry Maine published his classic treatise on "Ancient Law," he founded a school of historical jurisprudence of permanent worth. But it is a long time since 1861; and in the interval archaeologists, historians and anthropologists have assembled from every corner of the globe and from every era of human history masses of information as regards primitive law of which Maine excusably knew nothing. It is indeed a tribute to Maine's scholarly intuition that so many of his brilliant inductions have survived such a widening of the horizons of his subject; but the student of today, presented with all this new evidence, has a manifest duty to re-examine some of the old problems afresh.

To risk a few perilous generalisations, the conclusions which seem to be emerging from a study of the fresh data are these :— In every age and in every land the reactions to the advance of civilisation are very much the same. There is a single common reservoir of juristic ideas upon which every people draws instinctively when the need arises, applying the same solutions to the same problems, subject only to such variations as are imposed by racial, economic or climatic conditions, by foreign infiltration, or by wars of conquest or other like extraneous agencies. Viewed upon the cosmic scale the entire process is a standing illustration of the principle of relativity, for the phase reached in each community is not dependent upon the time factor but solely upon the stage of development which has been attained; so that much the same stratum of legal institutions can be traced, say, in early Babylon of 2,000 B.C., in Republican Rome, in Western Europe before the "age of Glanvill,"

and in some undeveloped parts of the world at the present day. The detailed differences are many, but they are submerged beneath substantial identity of content and of method.

If these views are well founded—and they are certainly supported by a volume of eloquent testimony—the legal historian must abandon the old insularity of outlook which confined attention to one system at a time and very rarely looked beyond the Law of Rome and the Law of England, and must be prepared to survey mankind from China to Peru throughout four millennia. Even if the new views are not wholly well founded (and it is still too soon to determine their exact validity), the student of early Scots Law has a great deal to learn from an examination of the many "books of the law," "codes" and other written legal compilations which have come to light—the Assyrian and Sumerian Laws, the Codes of Hammurabi and of the Hittites, the Laws of Gortyn and of the Greek States, the Hebrew Code, and the Laws of the Germanic States, from the Salic Law to the Lex Burgundionum. He will find, for instance, that there is nothing new under the sun; that conscious borrowing will not explain the repetition of the same ideas almost in the same words in several states widely separated in space and time; that early codes and legal textbooks tend to fall into several distinct categories, differing in source and in character; and that "legislation" (in the sense of the deliberate enactment of positive rules of law and practice), may have played a more important part in legal history than has hitherto been supposed. He will also learn, if he does not know it already, that false ascriptions of laws to lawgivers are as abundant as spurious charters. Against this crowded and suggestive background let us again look at the "statutes" of David I, William the Lion and Alexander II, as these have been recorded for us in the first volume of the Record edition.

The period covered by the reigns of these three Kings is 1151 to 1249. There have been ascribed to David 35

" statutes," to William 42, and to Alexander 15, making 92 in all. There are no contemporary or official records, and all that Thomas Thomson and Cosmo Innes could do was to reproduce the testimony of a number of MS. compilations, the earliest of which cannot be less than a generation later than the close of the period, and most of which were written at least a century after the last of the matters which they purport to record. Nor do the various MSS. speak with one voice, either as to the text of the enactments or as to their ascription to the several Kings. It follows that, from the point of view of direct authentication, matters could hardly have been worse; and the misgivings entertained by the editors have been reinforced by the blunt criticisms of later scholars. Here is a fair field for testing out new views of primitive law.

Taking first the purely formal aspect of the three sets of " statutes," it is easy to see that they fall into three distinct classes :—

(1) There are three reports of judicial decisions (Wil. cc. 22 and 23, and Alex. II, c. 3), and one report which is expanded into a " statute " (Alex. II, c. 10);

(2) There are a number of " statutes," properly so called, in the sense of formal records of an enactment bearing to have been made at a stated time and place by the King, acting in the presence, or with the advice or assent, of certain magnates named or described; and

(3) There is a large residue consisting of brief textbook formulations of some rule of law or practice, which are not ascribed to any specific source though occasionally introduced in the fashion of the time by some such dubious phrase as " dominus Rex statuit " or " statutum est." Most of these reappear in *Regiam Majestatem* or *Quoniam Attachiamenta*.

The Assise of David contains no example of class (1) or class (2), but examples of all three classes occur haphazardly throughout the so-called legislation of William and Alexander. Let us now examine more closely each of the three classes in turn.

I. *Judicial Decisions.* Wil. cc. 22 and 23 bear to be decisions made by the "Judices Galwidie," whoever they may have been. Both are directed to bringing Galloway into line with the rest of Scotland. Both occur in the early Berne MS. There is independent evidence that about 1175–76 William led an army into Galloway to subdue Gilbert, the son of Fergus (Lawrie, *Annals*, 205–6), and it is probable enough that these chapters record part of the efforts at settlement after the suppression of the disturbance. The substance of the decisions is repeated in Skene's *Regiam Majestatem* and in *Quoniam Attachiamenta*, c. 74. While therefore there seems to be no reason to doubt the authenticity of the decisions as records of important action taken in the reign of William, they are not "statutes" in the strict sense of the term, and it would be an anachronism to adopt at this period the later view of judicial decision as a source of law.

Alex. II, c. 3, is the "doom against Gillescop" pronounced at Edinburgh in 1228 by judges both of Galloway and of Scotland. The background is given by Fordun, and the record appears in part in the Berne MS. But it has no visible significance as part of the general law. None of these three chapters has any apparent claim to be included in a collection of "statutes."

Alex. II, c. 10, begins as a report of the decision in the action *Helen de Burneville* v. *Henry of Stirling*, which was discussed at some length in my *Select Scottish Cases of the 13th Century* (pp. 52 ff.), and it ends as a general enactment designed to settle the principle for the future. While this chapter may fairly be described as a "statute," it is more than doubtful on intrinsic evidence whether it belongs to the reign of Alexander II and its meaning is still conjectural.

II. *Statutes, properly so called.* Of these 16 belong to the reign of William and 6 to the reign of Alexander II; and if, as I suggest, chapters 30 to 35 of the Assise of William should be read as part of chapter 29, and chapters 37 to 42 as part of chapter 36, this category covers a large

part of William's so-called legislation. Four of William's "statutes" and all of Alexander's are dated. In the Assise of William the introductory formulae are vague and various, presenting a pretty problem for the constitutional historian, and raising a doubt as to their authenticity; but in Alexander's statutes the trend is towards the detailed particulars of the testing clause of a contemporary charter, and there are no solecisms or incongruities to suggest forgery. Moreover, nearly all these enactments contain place names or other terms which are distinctively Scottish. The statutes of William are well represented in the Berne and Ayr MSS., though the latter consistently attributes them to David I; but the manuscript authority for the statutes of Alexander II is relatively poor. As against that, many of Alexander's statutes are concerned with altering pre-existing law in a fashion which finds a congruous background in the mid-thirteenth century—the final stages of the trial by combat, the introduction as an alternative of the assise, the use of novel dissasine, the restriction of repledging, the employment of champions, the new indictment procedure, and other matters. The guarded conclusion is that all the chapters in this class are entitled to inclusion in a collection of statutes, that the chapters ascribed to Alexander II do in fact belong to his reign, and that those ascribed to William, except where sufficiently dated, may have been enacted either in his reign or in the reign of David I.

III. *The miscellaneous residue.* Within this class I would include the whole of the Assise of David, 11 chapters of William, and 4 of Alexander II. In addition to sundry vague aspirations after equal justice, judgment by peers, protection to widows, and to the poor, strangers and merchants and other generalities, we find the familiar text-book rules about the punishment of theft; the precautions to be taken to avoid an accusation of theft; the thief caught red-handed; haimsucken and other assaults; burthinsak; the harbouring of strangers; the lordless man; the precautions to be observed when travelling, especially by night;

the regulation of distraint; the right of asylum; the thief "habit and repute"; the hue and cry; and even the were-gild. None of this is distinctive of Scotland, nor indeed of any country, for it is all part of the common stock of most of the primitive codes which have come to light and can be paralleled more or less exactly by provisions to be found in different ages throughout Europe and the Middle East in every community which reached the state of reducing to written form, its embryo legal system. This category of the "statutes" belongs to an entirely different stratum from classes (1) and (2), and they do not all belong to the same stratum. They do not cover the whole field of law, civil and criminal, but only a small part, and many of them are visibly less mature than some of the very early codes of the Middle East, notably the Code of Hammurabi. They do not purport to change or correct the law, nor to introduce new provisions, but merely to declare either customary law or the effect of possible earlier enactments. A few can be traced to a probable source, their inclusion amongst the "statutes" being doubtless accidental. In the Assise of David, for example, chapter 3 echoes the Assise of Clarendon and chapter 5 Magna Carta; while chapter 35, which bears to introduce the assises of mortancestor and novel dissasine, was manifestly never passed by David I. Chapter 8 of William, which also appears in *Regiam Majestatem*, is an extract from Glanvill's *Tractatus*.

When perusing these old rules, one is sometimes tempted to wonder whether some monkish practical joker did not have a hand in their compilation. Some such person it must have been who foisted upon the lawyers of Scotland the preposterous fable about the sheep, the horse and the mill, which was actually accepted by Balfour in his *Practicks* (p. 509) as a decision by David I, and by Sir John Skene and Sir David Carnegie as chapter 26 of David II, whereas it was in fact an extract from an earlier variant of the Faust legend contained in the *Gesta Romanorum*, remarkable only because in the original it recounts the only known specimen of a legal rubric composed by the Devil in person—and in

elegiac couplets at that! Take for instance chapter 33 of David I, by which this King is actually credited with having enacted that any man who killed a dog must for a year and a day discharge the duties of the deceased animal by keeping watch over its former owner's midden: or chapter 10 of William, which prescribes the gap to be kept in a stream by requiring that it must be wide enough to enable a well-fed three-year-old pig to turn himself about without either his snout or his tail touching the sides. If any of my readers has encountered a parallel to these provisions in any other legal system, ancient or modern, I hope that he will communicate with the editor and so rescue me from the suspicion that these provisions were invented by some medieval A. P. Herbert.

The conclusion is that, when the time comes—and it is surely overdue—for a new edition of the early Scottish statutes, only class (2) of these enactments will be included, sometimes with cautionary notes, in the statutes of the period, and that classes (1) and (3) will be relegated to an appendix of *Fragmenta Collecta*.

T. M. Cooper.

THE COLLEGE OF JUDGES OF PAVIA

IN his book *The College of Justice*, the late Professor R. K. Hannay put forward the theory that the idea of establishing in Scotland a " College of Justice " so named, emanated from Erskine of Halton, the Royal Secretary, and that he, having studied at the University of Pavia, had probably been inspired by the College of Judges existing in Pavia at that time.[1] The purpose of the following notes is to give some idea of what is known today of this possible Italian predecessor of the Court of Session.[2]

Pavia, the Roman Ticinum, was the capital first of the Lombard Kingdom of Italy and then of the Frankish Regnum Italicum which superseded it. As the seat of the Count Palatine, the direct representative of the Frankish King (who was usually also the Emperor), it possessed from the ninth century schools of arts and law where the notaries, advocates and judges practising in the courts of the *sacrum palatium* received their training. Early documents in Pavia and other Northern Italian cities suggest that *judex et notarius sacri palatii* became a kind of academic title conferred by the law school of Pavia. The instruction given in this school was based on the texts of Lombard law and the Frankish capitularies relevant to Italy, but the teachers were certainly familiar also with the Roman law " *quae omnium est generalis* " which they used to supplement and interpret the Lombard law. Their highly developed exegetic method is demonstrated by the Expositio to the Book of Pavia, a commentary based on the work of generations of teachers and compiled in the second half of the eleventh century.[3]

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[1] *Op. cit.* p. 49 *et seq.*

[2] I am greatly indebted to Professor Pietro Vaccari of the University of Pavia, who provided me with a valuable note on the early documents and whose books, *Profilo Storico di Pavia*, and *Storia della Università di Pavia*, I have frequently consulted.

[3] See, for an accessible account, Vinogradoff, *Roman Law in Medieval Europe*, 2nd ed., p. 48 *et seq.*

From the beginning of the twelfth century to the middle of the fourteenth century the School of Pavia declined and almost died out. Two main causes contributed to this decay. One was the rise of the Bolognese School of Law, which regarded Roman law as a universal law superseding all other laws, whereas the masters of Pavia considered it a residuary law to which resort might be had to explain or fill lacunae in the Lombard law. Though certain indications such as a similar way of citing texts and a similar way of finding parallel passages, both in support of and in opposition to, the particular rule commented on suggest that Irnerius and his followers at Bologna were not unmindful of the work done by their forerunners at Pavia, Bologna soon attracted students who would earlier have attended the School of Pavia instead, with the result that the latter lost its character as a Studium Generale.

The other factor contributing to Pavia's decline as a law school was the dissolution of the Regnum Italicum and of its administrative and judicial organs centred at Pavia, with the consequent rise of autonomous Comunes, each with its own government and courts. The Count Palatine continued to represent the Emperor from his fortress at Lomello but his influence was slight. Thus the original function of the school to provide legal practitioners for the whole kingdom was lost.

It is against this background that the College of Judges appears. The first reference to it is contained in a document dated May 30, 1260,[4] when Pavia had been an independent Comune for upwards of a century. The document is expressed in stylised tautological language and contains a *consilium* given by the Sapientes Collegii Judicum in a case referred to them for their opinion by the judge and vicar of the Podesta of Pavia. It begins with a formal recital of the names of fifteen members of the college who heard the case, of the request for their opinion, and of the subject

[4] Bollea, *Documenti degli Archivi di Pavia relativi alla Storia di Voghera*, No. 145, also printed in Robolini, *Notizie appartenenti alla Storia della Sua Patria* (Pavia, 1830), vol. iv (i), p. 448.

of the dispute,—a claim by the Comune of Piacenza to exercise jurisdiction over the castle and villa of Monticelli, which claim was opposed by the Pavian monastery of St. Salvator. After an examination of the evidence, the Sapientes decide that the monastery is entitled, and finally advise the Podesta's judge and vicar that the Comune of Pavia should protect the monastery against the groundless claims of the Piacentines. The document is attested by an Imperial notary and by a notary of the Comune of Pavia.

By the middle of the thirteenth century, therefore, the College of Judges was a recognised body, probably a guild of practising lawyers united by the common object of furthering the interests of their profession, whose collective opinions on points of law were so highly regarded as to be sought by the judicial authority of the city in cases of difficulty. It seems likely that such a course was customary in important cases, although not obligatory.

Similar institutions to this were not uncommon in the cities of Northern Italy about this time. In Parma, for example,[5] a decree of 1217 attests the existence of a Council of Advocates and Judges of whom certain were chosen each year to serve as assessors to the Podesta and judge in causes. We read further,[6] that in 1290 the two colleges of judges and of notaries joined with the four principal arts (Butchers, Blacksmiths, Shoemakers and Furriers) in the common defence of the city of Parma when it was being besieged. It would appear from the late thirteenth century writer Fra Salimbene,[7] that in Reggio Emilia the College of Judges was so powerful that it could depose the Podesta itself. "*Fuerunt expulsi de regimine civitatis Regii per collegium judicum.*"

Further evidence of the prominent role played by the members of the College of Judges at Pavia in the life of the

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[5] Affò, *Storia della Città di Parma* (Parma, 1795), vol. iii, p. 91.
[6] Affò, *op. cit.*, vol. iv, p. 85.
[7] Quoted by Affò, Preliminary Discourse to *Memorie degli Scrittori e Letterati Parmigiani*, Book I, p. xx.

city is offered by fragments of a statute of Pavia of the thirteenth century. They show that the duties of the judges were not wholly judicial.[8] A rubric dealing with the maintenance of the quality of bread [9] provides that the Podesta and his vicar, on election to their offices, are to elect "*quinque judices ex melioribus collegii judicum*" together with four notaries and four merchants, and to make them swear to carry out faithfully certain duties relating to the inspection and control of bakeries.

Another rubric of the same statute [10] provides that three members of the College of Judges are to have the duty of guarding the keys of the city's writing chests. They are to swear on the Holy Gospels to preserve all the writings of the Comune contained in the chests, to keep an inventory thereof, and to ensure that new correspondence, etc., is properly deposited in the chests.

After the foundation of the University of Pavia in 1361, references to the College of Judges occur in the letters to and from the city authorities which had thus to be so assiduously preserved by its members. Pavia's municipal independence had ended in November, 1359, when the city surrendered to Galeazzo II Visconti, who had previously gained the lordship over all the other cities in Lombardy. Having established his court in Pavia, he encouraged the cultural and commercial activities of its people, while at the same time ruthlessly suppressing all vestiges of their former political independence. Little more than a year after Galeazzo's capture of Pavia, the Emperor Charles IV granted a diploma providing for the establishment of a "*studium generale utriusque juris tam canonici quam civilis necnon philosophiae medicinae et artium liberalium.*" It is a matter of debate whether this act was a creation *ex nihilo* at the instance of Galeazzo or merely a confirmation

[8] R. Sorriga, *Capitoli inediti di una Redazione Statutaria Pavese del secolo xiii*, Bolletino della Società Pavese di Storia Patria, 1922. The fragments are in the Archivio di Stato at Milan.

[9] Rubric 379.

[10] Rubric 387.

of an existing *de facto* Studium of limited proportions—the survivor of the old School of law. The local historians, not unnaturally, favour the latter view although the evidence for it is scant. Solmi [11] cites the flourishing condition of the College of Judges and also of the College of Notaries [12] as evidence for the probability of legal instruction having continued to be available even after the decline of the School of Law.

Whether there was any continuity between the ancient School and the new Studium or not, it is clear that the arrival of the teachers of law whom Galeazzo invited to come to Pavia and lecture in the new foundation brought some formidable professional competition for the members of the College of Judges. For the newcomers, many of whom were from rival cities, were eager to supplement their salaries by appearing as advocates and hearing cases as judges, and this aroused the jealousy of the old-established practitioners, who enlisted the aid of the city's Council of Twelve. In 1386 we find the latter writing to the Signore, Gian Galeazzo Visconti,[13] and complaining that in spite of a recent raising of the professors' salaries, the new Studium was declining. The reason for this state of affairs was not far to seek. "*Hoc autem contingit quia ipsi doctores non possunt insistere ad lecturam et ad quaestiones et littigia in quibus pro majori parte insistunt cum satis eis esset dictae lecturae insistere. Nam fertur quod non legunt pro medietate illud quod legi consueverat in bonis studiis.*" The Twelve ask Gian Galeazzo to publish a decree requiring the observance

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[11] Arrigo Solmi, *Persistenza della Scuola di Pavia nel Medio-Evo fino alla Fondazione dello Studio Generale*, 1024–1361 (Contributi alla Storia della Università di Pavia pubblicati nell' XI centenario dell' Ateneo, pp. 14–42).

[12] This seems to have been particularly powerful in Pavia, *cf.* R. Sorriga, Bolletino della Società Pavese di Storia Patria, 1912, p. 365 *et seq.* It existed from at least 1204 and had the privilege of admitting new notaries who showed on examination a sufficient legal education. The Anonimus Ticinensis (ed. by R. Maiocchi, Rer. Ital. Script., 2nd ed., vol. xi, p. 29), says that the notaries made a large college and had a *pallatium* for themselves. They administered certain property bequeathed to them to distribute the income to the poor. When a member of the college died, the others processed at his funeral singing, *sicut clerici*!

[13] *Codice Diplomatico della Università di Pavia*, ed. by R. Maiocchi, vol. i, No. 249.

of the customs and statutes prevailing in the time of his father, by which disputes were committed for decision only to members of the College of Judges, since it is more fitting that they be decided by citizens than by outsiders. The letter ends with the warning that if prompt action is not taken, the Studium will fade away completely and the judges, deprived of their privileges, will have cause to desert Pavia for other more congenial cities.[14]

Gian Galeazzo acceded to the request and decreed that "*non possit nec debeat assumi ad consulendum nec ad judicandum in aliqua lite causa quaestione seu controversia vertenti seu quae verti contigerit coram aliquo judicante vel magistratu civitatis nostrae Papiae aliquis qui non sit de Collegio Judicum . . . absque nostra expressa licentia.*"[15] The words quoted show that the business being "poached" by the academic newcomers was mainly that of an expert assessor—something like the jurisconsultus of the late Roman Republic, except that the latter received no fee—who advised on the law relevant to an action heard by a city magistrate, his opinion being sought either by the parties or by the magistrate himself.

Another letter from the Twelve, written fifteen years later to the same Gian Galeazzo (who in 1395 had received the title of the Duke of Milan) shows that after this incident the College continued to prosper.[16] The duke had asked for certain information about the state of the college, which is here called *Collegium Judicum et Advocatorum*. The Twelve in their reply, after pointing out that respect for the ancient statutes of the college (which have not survived) brings both honour to himself and contentment to his subjects, take the opportunity of requesting permission to enlarge the place in the city *curia* where the college was accustomed to meet, as the college had been considerably

14 "Quod quaestiones committi non possint nisi ipsis judicibus de Collegio et ne tam honorabile Studium ad nihilum reducatur et ne judices cives de Collegio destituantur eorum privilegiis et causam habeant vagandi ad alienas patrias."

15 Cod. Dip. cit., vol. i, No. 250.

16 Cod. Dip. cit., vol. ii, No. 1.

increased in size by the accession of many new and notable members.

This letter is dated February 5, 1401. Three years before, Gian Galeazzo, for reasons which are obscure, had ordered the transfer of the Studium from Pavia to Piacenza, at the same time forbidding his subjects to attend any other Studium. The return to Pavia was not ordered until 1402, so that when the letter was written there was, at any rate officially, no Studium in Pavia. This fact emphasises the distinction between the College of Judges and the College of *Doctores Utriusque Juris*, which was part of the Studium and which had received its statute, together with the University of Jurists, in 1395.[17] The membership of the two colleges certainly overlapped, as certain professors are known to have been elected to the College of Judges at least in the first half of the fifteenth century. The most distinguished jurist of the time, Baldus de Ubaldis, who was induced by Gian Galeazzo's offer of the unprecedented salary of a hundred florins a month to accept a chair in the Studium in 1390 and remained there until his death in 1400, may even have graced the roll of members, after having been in Pavia long enough to be considered a resident. The admission of professors of law to membership of the College doubtless increased as time went on but the College always remained, at least technically, quite separate from the university and its constituent colleges.[18]

No reference to the College has been found in the correspondence of the first half of the fifteenth century, owing probably to the disturbed condition of the period, during which *condottieri* struggled incessantly among themselves

[17] Its principal function was the control of examinations and degrees (Magenta, *I Visconti e gli Sforza nel castello di Pavia*, p. 105).

[18] Professor Hannay's statement in his edition of *Acta Dominorum Concilii*, iii, at p. xxxviii, that "members of it (sc. the College of Judges) belonged also to the Faculty of Jurisprudence" must therefore be restricted to the later period with which he is concerned. The last sentence of the note by Professor Arrigo Solmi quoted by Professor Hannay (*loc. cit.*) that "such colleges existed in all the Universities" is similarly inaccurate. I have been unable to trace the article by Roberti cited by Solmi. Possibly it refers to Roberti's article in Rivista Italiana di Scienze Giuridiche, 1903, p. 171, *Il Collegio Padovano dei Dottori Giuristi*, which deals with the College of Doctors in the University.

for power. About the middle of the century the Duchy of Milan passed from the Visconti family to that of Francesco Sforza, the most successful of these *condottieri*, who transferred the court and ducal favour from Pavia to Milan.

In 1458 we find a letter from the city to a ducal councillor, one Pietro Visconti, protesting that a certain case had been taken out of the jurisdiction of the *civitas* and of the *Collegium dominorum judicum*.[19] The addition of the word *dominorum* suggests an increase in prestige, possibly due to the accession of the academic element.

In 1461 the city authorities are replying to their ambassador at the Ducal Court about the interpretation of two decrees relating to the College.[20] The first, giving, apparently, a monopoly in the hearing of appeals to the College is so old that the city authorities have difficulty in finding any information about it. "*Perquisitum fuit maxima cum solicitudine sed de eo huiusque notitia aliqua haberi nequirit quia est valde antiquissimum.*" Possibly this refers to Gian Galeazzo's decree of 1386 (*ante* p. 209). The other decree relates to the jurisdiction of the College in the *comitatus* (the country immediately surrounding the *civitas*). It is argued that a clause providing that in certain unspecified circumstances, "*causae committantur competentibus civitatis proximioris,*" should be restricted to cases where it was uncertain to which *comitatus* the place where the dispute arose belonged. The city authorities finally comment somewhat smugly that a clause providing for the possibility of a shortage of legal experts in Pavia is never applied. "*Et deinceps ipsum decretum loquitur ' quando in civitate Papiae non esset copia jurisperitorum, ' sed per Dei gratiam ut nostis in civitate Papiae non deficiunt.*"

In 1473 a ducal decree was published[21] renewing the prohibition against all the doctors of law who taught in the

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[19] The Codice Diplomatico has been published only until the year 1450. This and later documents are transcribed by R. Maiocchi in a mss. book entitled Documenti Universitari del secolo XV. I am grateful to the Curator of the Museo Civico di Pavia for making this book available to me. (The letter here quoted is at p. 193.)

[20] MSS. book cit. p. 200.

[21] MSS. book cit. p. 439.

university at the public expense from practising as advocates, except in their own homes, on pain of forfeiting a year's salary for each contravention of the decree. No mention is made of the doctors acting as judges—possibly because their place in the College was by now recognised and could not be challenged.

It has not been possible to trace the later history of the College, but from what has been written it will be seen that it has no peculiar characteristics which suggest it as an obvious model for the Court of Session. The judges apparently included no ecclesiastics and were remunerated not out of ecclesiastical funds but at first by the Comune and later by the Duchy.[22] As has been remarked, colleges similar to that of Pavia were not uncommon in Italian cities and it is submitted that anyone who was generally acquainted with Italian institutions could be expected to be familiar with the idea of a College of Judges. It is therefore reasonable to assume, as does Professor Hannay, that James' proposal was explained to Pope Clement as a desire to establish a college of judges because it was thought that, if it were expressed in that form, Clement would understand substantially what James intended.

The order of events in 1531 is very clearly narrated by Hannay.[23] Erskine, who had come to Italy to further the efforts to secure a profitable match for James, left Rome in April, leaving Albany to continue negotiations with the Pope. On July 9, Clement wrote to the Scottish prelates asking for their opinion on a proposal that they should contribute 10,000 ducats a year for "the protection and defence of the realm," but saying nothing of any proposal to found a court of justice. On September 13, without waiting for a reply to his earlier letter, Clement published the famous Bull reciting that Albany had represented to him King James' desire to establish in Scotland a college of judges. This is the first mention of the proposal. Whose

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[22] *Cf.* Solmi's note quoted by Hannay (*ante*, note 18).

[23] *The College of Justice* cit. note 1, and *Acta Dominorum Concilii* cit. note 18.

idea was it? Hannay, after remarking—but without offering any reasons—that "the spokesman, Albany, is not a likely author," [24] assigns the responsibility to Erskine, on the grounds that he had studied at Pavia and therefore had in mind the College of Judges there. There are, however, difficulties in the way of this view. There is no trace, for example, as Hannay himself admits, of any communication on the subject in Erskine's letter book. Albany, on the other hand, was perfectly familiar with Italian institutions. He had on various occasions acted as the ambassador of Francis I of France to Italian courts. His wife's sister was married to Lorenzo dei Medici, Duke of Urbino, which undoubtedly counted for something with Pope Clement, who was himself a Medici. If, as Hannay declares, the whole transaction bears "an air of collusion and hasty extemporisation," then Albany is likely to have acted in it, not as the mere mouthpiece of James' advisers, but rather as one having authority to formulate James' proposals in his own way without constant reference back to Scotland.

PETER STEIN.

[24] *Acta Dominorum Concilii* cit. p. xxxviii.

THE GREEK VIEW OF LAW[1]

LET me say at once that I here intend the term *law* to be understood not in any one of the narrower modern senses but with a breadth of meaning proper to ancient Greek thought on this subject. I shall have nothing to say about the merits of the Greek theory of law : my only object is to state—not, of course, fully but in outline—what that theory in fact is. The Greek view of law is, in a word, cosmic, embracing the whole universe in the bond of one common, living, law. I propose to show how in Homer and Hesiod this notion, at once legal and ethical, is grounded upon religion; how, without prejudice to the foregoing, Anaximander, Heracleitus, Protagoras, and the Pythagoreans seek to relate it to a philosophy of science and mathematics, and, finally, how Athenian democracy returns in full circle towards the mind of Homer and Hesiod.

In Greek the universalisation of law first appears, as I have just said, in religious thought, in the idea of the supremacy of Zeus. Already in Homer Zeus is a truly cosmic god : gods, men, and the forces of Nature—day and night, wind and storm—obey his word. The *Iliad* itself is introduced as a story of the fulfilment of his will. The Horai, *Times* or *Seasons*, the goddesses representing timely order as in the course of the year, are the keepers of his gate on Olympus. This conceit is obviously derived from the poet's daily experience of the timely opening and closing of the city gates at dawn and sunset, and exemplifies the alliance between Zeus and cosmic law. Upon this hint from Homer we shall see that Hesiod very soon elaborated a conception of the three Horai as signifying the three great elements of the Greek civic and cosmic ideal, *viz.*, Perfection of Law attended by Justice (Righteousness) and Peace.

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[1] Being the Charles Gordon Mackay Lecture in the University of Edinburgh, delivered March 5, 1952.

That Homer, the man who took old stories, as Tennyson took the legends of Arthur and the Round Table, and made out of them, and his own mind, works characteristic of himself and his own age—that Homer himself lived within the epoch of the Greek city State is proved by more evidence than we here have time to consider: let one instance serve. Homer's mind is so steeped in the ideas of the city State that he imports into Olympus the civic forms and spirit of the parliament square. Thus, on one occasion, at a full assembly of the gods, he makes Zeus, even in one of his most imperious moods, open his address with the typically political request, even though here it is a demand, for the formal approval of his parliament. "Hearken to me, all ye gods and goddesses, that I may tell you what my heart bids me. One thing let none attempt, god or goddess, namely to thwart my saying. Approve ye it all together, that with all speed I may execute these matters." The life from which that scene is imagined is plainly political.

Besides the parliamentary assembly another characteristic of Greek political life is the administration of justice by judgments of law, θέμιστες, awarded by kings or councillors in court in the parliament square. The nature of Homer's social experience and social theory is nowhere better revealed than, by way of deliberate contrast, in his account of the Cyclopes—"a high-handed and lawless folk, who, trusting to the deathless gods, plant not aught with their hands, neither plough, but behold all these things spring for them in plenty, unsown and untilled, wheat, barley and vines . . . and the rain of Zeus gives them increase. These have neither *assemblies of council* nor *awards of law*, but they dwell in hollow caves on the crests of high hills and each one awards law to his children and his wives and they regard not one another."

To this day Sicily is famous for its hill-dwellers, and Malta for its caves—and megalithic remains (in more than one land the foundation of a legend of giants, such as Og, the King of Bashan, and his giant people in the Old Testament). It is not surprising that Homer knows an old

tradition of giants living in caves on hills in an island in the western sea. Tradition evidently conceived them as relics of a bygone age, an age to which, as to Hesiod's Bronze Age, there cling some attributes of the Golden Age or Garden of Eden, when men (like the gods, in Homeric phrase, "living at ease") enjoyed the spontaneous fruits of Nature, before men fell—to agrarian labour and agrarian food as under the curse, "In *the sweat of thy face* shalt thou eat *bread.*" But, just as there are confusions in the stories of Genesis, so—apart from their pastoral activities—by a curious conflation of types the Cyclopes are made agrarian in having wheat and barley, but they have these without work.

Homer's use of this tradition is characteristic of his view of law. In Greek mythology Zeus was neither the creator nor even the first sovereign of the universe : his reign succeeded those of his father, Kronos, and grandfather, Ouranos. Homer holds that civilisation belongs to the rule of Zeus and no other; and the bad old ways are alien to that dispensation. How bad they are Homer shows in the brutal, ruthless Cyclops, Polyphemus—and that notwithstanding the fact that in the tradition he is son of Poseidon. "He answered out of his pitiless heart : 'Thou art witless, or thou hast come from afar, who biddest me either to fear or shun the gods. For the Cyclopes regard not Zeus nor the blessed gods, for truly we are their betters far. Nor would I, to shun the enmity of Zeus, spare either thee or thy company, unless my spirit bade me.'" It is fundamental in Homer's (and not only in Homer's) creed that civilisation—the civic achievement in good life, with the forms of council and law court and the spirit of humanity —comes only from, with and by Zeus : the Cyclopes are outside his covenant. This is the essence of Homer's law, politics, and religion.

We now come to a topic of critical importance for the understanding of the Greek view of law—the doctrine (it is no less) of the poet Hesiod, who, starting from the same

foundations of belief as Homer, undertakes the systematic exposition and elaboration of the cosmic creed.

"Right lives by Law; and Law by Power subsists." This now rather trite political maxim has its counterpart in Hesiod's story of the establishment of the dominion of Zeus. In the *Theogony* he devotes over a hundred lines to describing the battle which ended in the final victory of Zeus, upon which the other gods, on the advice of Gaia, Mother Earth, pressed him to take the kingship into his own hands. His sovereignty, then, begins in power: but, unlike the despotisms of Ouranos and Kronos, who for their sins were overthrown, the dominion of Zeus, though beginning in power, endures by law, by his obedience to the law of righteousness. As the Hebrew says of his God, "his own arm brought him victory, and his righteousness it sustained him." Thus, on assuming sovereignty Zeus divided unto all the gods their "honours," *i.e.*, their constitutional prerogatives. And to those who had come to his call for allies before the great battle was to be joined, "as he promised, so unto all he fulfilled utterly." So Styx, the daughter of Okeanos, "he made to be the great oath of the gods, and her children he made to dwell with himself for ever more": these were Zeal, and Victory, and Power and Strength, "who have no home apart from Zeus, nor any dwelling, neither any way save that wherein God guides them. And himself he holds great power and reigns." And in another place in Hesiod we read, "To fishes and beasts and winged birds Zeus gave this law, that they should devour one another, since there is no justice in them: but to men he gave justice, which is far the best." This is the union of might with right in the Greek ideal of human civilisation: power is controlled by law, and law maintained by power, under the royal and religious government of God. Isaiah well knew the pattern of this ideal and of the history out of which it grows. "Of the increase of his *government* and *peace* there shall be no end, upon the throne of David, and upon his kingdom, to *order* it, and to establish it with

judgment and justice henceforth even for ever. The *zeal* of the *Lord of hosts* will perform this."

At this point it is relevant to remark that by coincidence (how arising is hardly within our knowledge) with Hebrew thought, and by historical Greek influence on Hebrew thought, the essence of Greek thought, which is their view of law, came down to medieval Europe, that is, to medieval Christendom, and thence to us, through Christianity more than (in many generations) through direct knowledge of Greek literature (" Graecum est : non legitur "), and more than through pagan Latin literature or pagan, or even Christian, Roman Law : for even under Christian Emperors Roman Law never lost the stamp of its old Roman character, which is so different from the spirit seen in the history of law in Greece, and, I may add, in England. But let us return to Hesiod.

In Hesiod, the character of the kingship of Zeus is further indicated in his marriage with Themis, *Law*, and in their children, the three Horai, *Times* or *Seasons*, and the three Moirai, *Fates*. The three Graces, his children by Eurynome, and the nine Muses, whom Mnemosyne, Memory, bore him, personify the arts of the civilisation which he bestows and by the Horai and Moirai upholds. The Horai represent the principle of dynamic regularity in general as well as in the course of the year. The names Hesiod gives them speak volumes. The first is Eunomia, Perfection of Law. To the Greek order is the essence of law. νόμος is a settled order of performance, a rule of life, a custom, a law. The second is Δίκη, the right way, righteousness, justice. The third of the Horai is Εἰρήνη, peace (from civil or external war). Without these there can be no prospering : but, even so, prosperity remains in the gift of the Moirai, the inscrutable dispensers of destiny.

Over against these in his cosmic system Hesiod sets the powers of darkness, Eris, *Strife*, daughter of Night, and the children of Eris, including Dysnomia, *Lawlessness*, and Ruin, and Oath. The eunomic gospel, with its cry for justice, in Homer and Hesiod as in Amos and Zechariah, is

evoked not by what is fondly called primitive barbarism but by a sort of educated iniquity, in which, if we may judge by Homer's Autolycus and Hesiod's speech, as I take it to be, in his case against Perses, the abuse of ordeal by oath was a prominent and sinister sign of considerable progress in the wrong direction. *Strife* represents feud of all kinds, including the violent reprisal of uncivilised revenge which precedes, as ordeal by oath threatens to strangle, the development of justice according to law.

Further, according to men's attitude to δίκη righteousness and justice, Hesiod contrasts also αἰδώς, lawful fear, with ὕβρις, lawless pride. Thus he aligns Eunomy, Justice, Peace, Lawful Fear, the favour of the Fates, and Prosperity against Lawlessness, Oath, Strife, Envy, Lawless Pride, the adversity of the Fates, and Ruin. And the key to the good life is with the eunomic triad. Eunomy, perfection of law, is a form of order, implying justice between the parts and peace within the whole. "Behold, a king shall reign in righteousness . . . And the work of righteousness shall be peace," as Isaiah has it. Such is the spirit of eunomy: and, subject to the Fates, it leads to prosperity. We have ceased to look for the reward of the righteous in worldly fortunes. But Hesiod makes the Moirai daughters of Zeus and Themis, *Law*, typifying some connection between fortune and merit. And it is a dynamic faith. The doctrine that men will not attain even the potential blessings of their destiny without work is written all over Hesiod and his eunomic successors—including Saint James, in some ways the most Greek of the New Testament writers: that is why he is anathema to Martin Luther. Rightly or wrongly, to many of us today law too often means little more than an edict of Parliament, or of Whitehall, without soul, sense, rhyme, reason, life or joy. To the Greek law is a pattern of life: eunomy, perfection of law, is a life of social discipline and service.

In this religious jurisprudence the question whether it is Zeus or Fate that holds supremacy has no meaning. In the *Iliad*, when Sarpedon is about to be killed in battle,

Zeus says to Hera, "Woe is me that it is fated that Sarpedon, dearest of men to me, shall be subdued under Patroclus. And my heart within my breast is divided . . . whether I shall snatch him up alive out of the battle . . . or shall now subdue him beneath the hands of Patroclus." And Hera said, "A man long destined to doom dost thou desire to deliver from death? On with the deed: but we gods will in nowise approve thee." Here the matter goes far beyond the political constitutionalism of parliamentary approval of the sovereign's will: it goes to the root of cosmic law. The law of Fate is supreme: in the event Zeus bows to it, and Sarpedon is killed. But Zeus also is supreme: as Hera admits, if he will he can save his beloved son. Yet there is here no contradiction, any more than in Christian theology. "Thinkest thou that I cannot even now pray to my father, and he shall presently give me more than twelve legions of angels? But how then shall the scriptures be fulfilled, that this it must be?" The Christian can say that the scriptures express the will of God: but that is beside the point, which is that God's omnipotence, exactly like that of Zeus in Greek thought, includes and at the same time excludes what he could do if he would but will not do though he can, *i.e.*, in the Christian case, depart from the course defined in the scriptures which he has, to say the least, sanctioned.[2] Indeed the matter is even less difficult in Greek; for Zeus, like the rest of the Greek gods, is created within the universe. Hence it is not hard for the Greek to hold that the law of the universe is also the law of Zeus' own being, as testified in the righteousness which he, unlike his sinful (and fallen) predecessors, upholds: the law is in his breast no less than in the bosom of Fate. Of course this leaves the Greek with the problem of evil: but the Christian has the same problem to face. So much for the specifically religious aspect of Greek jurisprudence.

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[2] Here, of course, harmony between the Father's will and the Son's is tacitly assumed.

Let us now consider how the concept of cosmic law is further developed in Greek science. Shortly after 600 B.C. Anaximander of Miletus published a theory of the universe as comprising many worlds, κόσμοι, originating out of a governing infinity, by the separation of opposites (heat and cold, etc.) out of that infinity. These opposites are kept in balance by Rotation, which by force of Necessity working through Time as it makes for order, compels the opposites to do one another right and reparation (the terms regularly used in human law) for any breach of right, *i.e.*, for their encroachments on one another. This is a doctrine of an impersonal force, Rotation, expressed to operate uniformly under a physical law in a physical way in a physical universe without, it seems, the intervention of any god. In fact, in a play of Aristophanes in 423 B.C. the atheist boasts, "Zeus is cast out and now Rotation reigns." But that is in a comedy: Greek philosophers were not much addicted to atheism. Indeed, to the Old Covenant and the New Clemens Alexandrinus joins Greek philosophy as the third, the Covenant of the Gentiles.

I do not propose to follow up the concept of law in Greek science and philosophy at large: the application of the principle to the theory of one of the most important forms of social conduct, *i.e.*, language, is sufficiently illuminating. In this connection begins the record of a Greek word which occurs in so many English derivatives—theology, zoology, etc.—that it is almost an English word, the word λόγος.

In Greek λόγος means *putting together*, in *speech*, by way of narrative, as in relating a story, or in *reason*, by way of logic, as in relating cause and effect. The doctrine of λόγος as cosmic law, Nature's law, is founded by Heracleitus of Ephesus (about 500 B.C.). In and before his period, by renewed and increasing contact with other peoples, Greek thinkers had been led seriously to consider whether national customs had any force or value, and if so why and of what kind. Not only language as a form of social conduct but all the prevailing standards of social ethics,

including—as ethics still did—politics, came under the same question : Is there a cosmic, eternal, natural, or merely a local, temporary, conventional right and wrong in language, or indeed in anything human? If the Greeks have as much right to say χρόνος as (for instance) the Romans have to say *tempus*, has a community of brigands or pirates as much right to call stealing honourable as others have to call it wicked? Thus the nature of language was but one topic in the philosophical debate on truth : and Heracleitus set himself to relate language and truth to the common law of the universe.

He regarded things as each in itself a strife, a contradiction. The river is always changing, yet ever the same. The archer's bow is an inherent contradiction, of a pulling apart, of the string by the bow, and a pulling together, of the bow by the string. And (mark this particularly) the *name* of the bow is life, its *work* death. In Greek, apart from a difference in accent, βίος, βιός may mean *life* or *bow*. It is only by the λόγος (natural law, reason) of contradiction that a thing, or the sum of things, exists : it is only by that λόγος that the contradiction makes sense. But the logical coherence, the reason, embodied in everything is also, if one may so use the word, embodied in the mind of man. The senses, eye and ear, says Heracleitus, are bad witnesses ; they speak a language we cannot understand : and modern psychology has borne this out. But every man's mind shares the λόγος of the universe. We must therefore in our language stand firm by the common mind which all men share with the universe and so with one another, as a city by its laws, and more so : for all human laws, νόμοι, are nourished by the one high νόμος, omnipotent, all-sufficing and paramount, the law of the universe.

From these premises Heracleitus draws the conclusion that, when men utter speech sounds, so far as their utterance chimes with the reason that sounds (as we say) in the universe, in the return of the seasons and all the works of Nature, so far is their utterance λόγος, reason in speech :

otherwise, however much it may be mistakenly used among men, if it does not manifest the common reason and law of the universe, it is but meaningless noise, idiotic nonsense. Utterance to be talk must have in it the tale of the universe. This is one of the most powerful and dangerous ideas in the history of thought; and it testifies very forcibly to the Greek worship of cosmic law.

It is no accident that further light on Greek theories of law comes from another—a rival—Greek theory of language. The great Democritus (*c.* 460–370 B.C.) is quoted as saying that language is not, as Heracleitus asserted, a product of Nature, but is constituted only by human rule, νόμος. We might say that irregularity and anomaly prevail in language precisely because it is a natural growth. But Democritus says that its irregularity is actually one reason for believing it is not the work of Nature. This again takes us back to some of the foundations of Greek thought.

There can be little doubt that in Homeric courts judgments of law were, in the main, at least ostensibly based upon custom. In my opinion, however, custom as a fact fails to meet all the needs of any society, certainly of such a complex and progressive society as we find in Homer and Hesiod. But if practice speaks with an uncertain voice, or its voice is not heard, what then? When the rule of practice threatens to fail, the rule of theory comes to its support. In such case among many peoples we find words meaning *straight* used in an ethical sense: that is the history of the English word *right*. The geometrical notion is not usually carried much farther than to suggest, as an opposite term of ethics, *crooked*: so in Homer and Hesiod the word σκολιός, *off the straight*, is applied almost as a technical term to the perversion of right in courts of law by "crooked awards of law" or "crooked awards of right." But the Greeks went much farther than that. Greek philosophy is permeated and dominated by geometry: one of its best-known sayings is that ascribed by Plutarch to Plato, that God always works

by geometry. In Homer and Hesiod μέτρον, *measure*, *i.e.*, right measure, is a term in their ideal of κόσμος, *order*. About 630 B.C. the poet Mimnermus says, "Truth is the most just (righteous) of all things." The geometric quality of that statement is characteristically Greek, and has a remarkable parallel in the English,

"Beauty is truth, truth beauty,"

which was inspired, as the context shows, by the geometric (I use the word as a term of mathematics, not archaeology) beauty of the form and decoration of the Grecian urn. So Democritus, as we saw, holds that if Nature had made language she would have made it straight and regular. Similarly in his statement of an old theory that happiness consists not in riches but in righteousness and wisdom he uses for righteousness not the usual derivative of δίκη but a new word, found only in this place, a derivative of ὀρθός, *straight*, *viz.*, ὀρθοσύνη, *rectitude*.

In the same spirit, and indeed before him, Protagoras (480–411 B.C.), the father of European grammar, holding with Democritus and against Heracleitus that language is based on human rule, yet applied to it the canon of cosmic rectitude, on the principle that what is made by rule should be made regular: and by this right, in instances some of which are recorded, he told the Greeks that what they were actually in the habit of saying was, rightly considered, wrong.

The school of Protagoras made great play with the terms *orthoepeia* and *orthology*: and the relation of Greek science of language to Greek jurisprudence is illustrated in some other notable compounds of ὀρθός. Thus we find ὀρθόπολις, *holding the city straight* (a picture suggested by a passage in Homer—*Iliad* 23, 316f.—which Mrs. Agatha Christie in the foreword of her volume, *The Labours of Hercules*, quotes with characteristic acumen as typical of the Greek spirit), ὀρθοδίκας, *with straight awards of right*, ὀρθοδίκαιος, *with straight principles of right*, ὀρθόβουλος, *of straight counsel*, ὀρθοδαής, *with straight* (*i.e.*, not misapplied) *skill*, ὀρθόνομος, *with straight law*, and ὀρθοπραγῶν, *of*

straight conduct. These express the ideal of the orthonomic apostles of eunomy, perfection of law, especially Aeschylus and Pindar, from whom all these are taken, except the last, which comes from Democritus. This type of eunomic jurisprudence and what I call orthonomic logosophy were kindred applications, to life and language respectively, of the old theory voiced by Heracleitus in his statement that all human laws are nourished by the paramount law of the universe. So on this common principle the opposing schools of Heracleitus and Protagoras, by opposing methods, both insisted that human practice must conform to cosmic law.

Now let us briefly consider the Greek mathematical theory of cosmic law as that theory was applied specifically to the constitutional law of the State. "At the time of the Persian Invasions," says a Theban in the pages of Thucydides, "our city was neither an isonomic oligarchy nor a democracy, but was in the hands of what more than anything else is the opposite of law and moderation (*σωφροσύνη*) and the nearest approach to despotism, *viz.*, an oligarchic usurpation of power." "There are two kinds of *ἰσότης*" (a word covering our *equality* and *equity*), says the fourth-century Isocrates, "that which gives the same to all, and that which gives to each man his due. That which gives the same to good men and bad the men of old rejected as unjust: they preferred that which assigns privileges according to merit." In short, eunomy implies not arithmetical but proportionate equality.

This theory is implicit, and indeed is sometimes expressed, in Homer: but it owed much of its elaboration to the Pythagoreans, especially in the period from about 550–450 B.C. The cosmic quality of thought is obvious in the statement of Pythagoras that realising the need for *δίκη*, justice, men have assigned the same function to Θέμις, cosmic law, in Heaven, to *Δίκη*, avenging justice, in Hades, and to Νόμος, civic law, on earth, in order that those who have committed the sin of disobedience may be displayed as offenders against the whole structure of the

universe. And the Pythagoreans taught that the nature of cosmic law was mathematical. They studied the principles of proportion, and its form, as in the ratios of musical intervals, and they believed proportion to be fundamental in everything and in every relation in the universe.

Thus the Pythagoreans defined health as a matter of proportion, as a μέσον, a point of balance between extremes, hot and cold, wet and dry, and so on. Thus Alcmaeon says health is ἰσονομία, balance, just proportion, and disease in μοναρχία, exclusive dominance by one extreme (as, no doubt, of heat in fever): and ἰσονομία itself he defines as a proportionate, σύμμετρος, mixing of any given things. So in the State eunomic isonomy means not flat arithmetical equality but a proportionate and equitable distribution of rights among the members of the State according to their functions and qualifications, in order that, as in a musical instrument or in the human body, so in the body politic each constituent part may have its due and thus salutary proportion may reign throughout the whole. Admittedly this gives us an aim but not a method: who is to diagnose our qualifications and functions, and how? But the aim at least is clear. Eunomic balance is not peculiar to any specific shape of constitution, broad or narrow: eunomy is a principle, a spirit of justice, order, and diligence embodied in the laws of a free commonwealth.

The eunomic ideal, like any other, has too often been discredited by its professors. But abuse does not go to quality. And few have doubted the sincerity of Homer, Hesiod, Callinus, Tyrtaeus, Solon, Pindar, Aeschylus, Plato, Isocrates, and Aristotle, the great torchbearers of the eunomic light, and of Saint Paul and Saint Augustine who carried it into Christianity. In the fifth century B.C. men like Aeschylus came to fear that the rising tide of democracy in Athens would sweep away the old foundations of law in the State. The comparatively small volume of law in ancient Greece, even in classical Athens, and not least the rudimentary state of the criminal law, helped the Greeks to retain their dynamic view of law as the shape of

the good life (after the Greek notion of perfection, by the quality of nature in the form of unity) in the commonwealth of the city State. This was what Aeschylus—rightly or wrongly—feared might be lost if democracy put law at the mercy of the multitude, who, as he—rightly or wrongly—feared, might recognise no law but their own judgment of expediency. Certainly Pericles, as reported by Thucydides, in a famous speech of 431 B.C. sets out to prove, and confirm, the devotion of Athenian democracy, in its unique way, to the eunomic ideal of work, patriotism, and freedom under self-discipline. But it may be that, as Thucydides says, under later demagogues democracy expressed itself otherwise. Democracy was rare and its success more rare in ancient Greece. The success, such as it was, of democracy in Athens was due, I believe, to the singularly strong continuity, above all in the progress of law, to be seen in her history: in its forms and in its spirit Athenian democracy kept much of the eunomic tradition. Her empire was no mean political achievement. For it and for other needs of the time the volume of her law was greatly increased. But in written law, as indeed in fossilised though unwritten customary law, in a given case—*e.g.*, a home-made will—justice must sometimes be abated for the sake of certainty in general. That arbitrary autocracy of the multitude which Aeschylus had feared, when it had gained full control of the courts proved capable of devoting itself (imperfectly indeed—as we might guess from one of the Aristotelian *Problems*, Why do the judges always vote for the relatives and not the will?—but nevertheless) to the ideal of equity above the law. But that itself is an ideal of law, of a truer law than that on the Statute-book. One of the duties that fell to James VI of Scotland after he went south to take over England was to set Equity above Law, as a fresh resort to the fountain of royal justice when its flow was choked in the channels of strict law. The Athenian ideal of equity, the higher law, is in the tradition of Heracleitus and his concept of Nature's law, as contrasted with the orthonomic theory of

law represented, as we have seen, by the school of Protagoras: and the Athenian ideal of equity would have had the sympathy of Homer and Hesiod, who already knew too well how feebly, sometimes, the forms of law fulfil its end.

In brief, then, we may say that to the Greek law is a way of life. Eunomy, perfection of law, is the salvation of the commonwealth through order, justice, and peace, the purge of pride. So Hesiod preaches to the Greeks; and so some of the Hebrews also hold—witness the end of Deuteronomy XVII, and the familiar words of Zechariah: "Rejoice greatly, O daughter of Zion; . . . behold, thy king cometh unto thee: he is just, and having salvation; lowly, . . . and he shall speak peace unto the heathen." And the Greek view of law is cosmic, embracing the universe of gods, men, and Nature in the bond of one common law, by which alone men may live their lives in the most natural, the most human, and the most godlike way.

P. B. R. Forbes.

RECENT LEADING SCOTTISH CASES

By David M. Walker, m.a., ll.b., ph.d., Advocate

THEFT—Reparation—Liability of thief to restore.

In *Gorebridge Co-operative Society* v. *Turnbull*, 1952 S.L.T. (Sh.Ct.) 91; 68 Sh.Ct.Rep. 236, the learned sheriff-substitute had to venture into a tract of law little illustrated by decisions. The defender broke into the pursuers' premises and stole some £300, for which he was sentenced to imprisonment. The pursuers now sued for recovery of the money by way of an action for payment with pleas appropriate to an action for breach of contract. This claim the sheriff-substitute rejected as incompetent. Their remedy, he held, was an action of restitution against the thief so long as the stolen property remained in his possession (in effect, the old common law action of spuilzie) or an action of delict if his possession had terminated, which latter he considered was the appropriate basis in the present circumstances for the action in respect that as no *vitium reale* can attach to money, specific restitution was inappropriate and the alternative obligation of reparation consequently solely available. The measure of reparation was not discussed but would presumably be the full amount of loss and damage sustained by the pursuers, which would in this case be the full value of the money stolen. It is well to have it emphasised that a criminal remedy does not extinguish any concurrently available civil remedy, a view sometimes erroneously held, possibly on the analogy of the outdated English rule that "a trespass is merged in a felony." The scope of the claim for restitution of property stolen or removed is also very generally overlooked now that spuilzie—which was the commonest action of all in the courts in the sixteenth and seventeenth centuries—has fallen into desuetude. Spuilzie might have been appropriate in this case, unless on account of the specialty that money was involved, and one would be glad to see a pursuer brave enough and skilful enough to raise an action of spuilzie.

The distinctive Scottish doctrines relating to the " law of the tenement " were neatly and briefly illustrated in *Duncan Smith and McLaren* v. *Heatly*, 1952 S.L.T. 254. The appellants were charged in the police court with failing to comply with a notice served on them under an Edinburgh Corporation Act and requiring them to repair the pipes carrying off rain-water from the roof of their premises. The premises in question were a four-storey tenement block but the appellants were owners only of a shop on the ground floor. In these circumstances the High Court sustained an appeal against conviction and dismissed the complaint as incompetent. The appellants' titles conferred on them no right of property other than in their own shop, and in particular they had thereby no right of property in the roof and the defective pipes thereon, but had only an interest therein in common with the several proprietors of other portions of the building in question. Liability for pipes on the roof accordingly had to be determined by common law. The obligation of maintaining the roof and the pipes in question fell entirely on the proprietors of the top floor, who were therefore solely " owners of the premises " within the meaning of the local Act in question. It is not surprising that when tenement properties come to be owned in distinct flats by separate owners conventional provision is frequently made to apportion the expenses of the repair of the roof and common parts but, failing such an express paction, it is well to remember (and not possibly very generally known among laymen) that the liability is neither joint and several among the owners nor in any way apportioned.

HERITABLE PROPERTY—Law of " tenement " —Liability for repairs.

The consensus of judicial and professional opinion on the effect of the Contributory Negligence Act of 1945 has hitherto generally been that the " last opportunity " rule was now dead and fell to be consigned to the limbo of common employment and the *jus mariti* and trial by battle. (See the dicta collected in *Winfield on Torts*, 5th ed., 425–6.) It may not, however, be quite dead, or else, as legal forms have a habit of doing, may yet rule us from the grave. In *Sharp* v. *Glasgow Corporation*, 1952 S.L.T.(Sh.Ct.) 69, a boy

CONTRIBUTORY NEGLIGENCE—" Last opportunity " rule.

of six shuffled slowly backwards across the pavement and out on to the roadway in the course of endeavouring to stop a ball. A bus was approaching: it could have stopped in time and the driver had ample opportunity to see the boy; but he only swerved and the bus struck the boy, who died as a result. The sheriff-substitute applied the "last opportunity" rule and awarded full damages to the father, despite a finding that the child had been guilty of prior negligence. The sheriff, however, adopted from *Nance* v. *British Columbia Electric Ry.* ([1951] A.C. 601), the proposition that in running-down cases the pedestrian owed a duty to the driver of the vehicle to act carefully and keep out of his way when both parties were moving in relation to each other, and accordingly attributed one-eighth of the blame to the child and reduced the damages proportionally. He formulated very attractively the view that the "last opportunity" rule is not necessarily obsolete, at least in cases—such as the original, *Davies* v. *Mann* ((1842) 10 M. & W. 546)—where there is a "static obstruction" rather than a "moving target." We may then have the position that in "static" cases the question is whether the moving object had the last opportunity of avoiding the static or not, and in "moving" cases the question which of the two moving objects really caused the accident or in what proportions they jointly did so. We now await a "static" case to see whether this distinction is sound. It does appear to recognise the material difference which may exist between different sets of circumstances.

CONTRACT—Ticket conditions excluding liability.

Conditions printed or referred to on a ticket are a familiar means of importing into a contract an exclusion or limitation of liability for damages, and there is already a substantial volume of law on the subject. In *Taylor* v. *Glasgow Corporation*, 1952 S.L.T. 399, a woman went to a public bath-house in Glasgow to have a hot bath as she had done frequently before. She received a ticket on which were printed conditions purporting to exclude liability. It was held that, although she had repeatedly in the past taken such tickets and had in this case waited for half an hour and so had had ample time to read what was printed on the ticket, reasonable steps had not been taken to bring the conditions to the knowledge of the

pursuer and consequently that the condition excluding liability did not exclude her claim. What is interesting in the case is the distinction taken between cases such as the present, or tickets for entry to a cinema or a football match (*Skrine* v. *Gould* (1912) 29 T.L.R. 19), where the ticket is a receipt for money paid and is surrendered almost at once to another attendant as a pass giving entry to the premises, and tickets for rail or sea travel, usually retained by the individual for a longer period and where conditions may be expected. It is possibly, however, questionable to what extent the ordinary individual taking a travel ticket would expect conditions. To the lawyer conditions affecting liability arising from the contract of carriage are overwhelmingly familiar. But this does not affect the validity of the distinction taken in the present case which seems substantial and material, though on the facts there would appear grounds on which a proof might show that the pursuer was aware of the contract conditions.

RECENT LEADING ENGLISH CASES

By W. A. Elliott, M.C., B.L., Advocate, and of the Inner Temple, Barrister-at-Law

INDUCING BREACH OF CONTRACT— The D. C. Thomson dispute.

The case of *D. C. Thomson & Co., Ltd.* v. *Deakin and Others* [1952] 2 All E.R. 361 has achieved widespread political publicity and it may be of interest to reiterate the legal issues involved. Like most industrial disputes these days it did not involve any question of conspiracy, for the case of *Crofter Hand-woven Harris Tweed Co., Ltd.* v. *Veitch*, 1942 S.C. (H.L.) 1 has negatived most actions against trade union members for conspiracy where an embargo imposed by them was clearly for the purpose of benefiting other members of the union. The legal issue raised by the D. C. Thomson dispute was purely whether the tort of inducing breach of contract had been committed and, in deciding that it had not, the Court of Appeal has clarified a difficult chapter of law, in the same way as *Veitch* has clarified the tort of conspiracy.

The dispute arose because the plaintiff firm of printers and publishers required all their employees to sign an undertaking not to become members of any trade union. Despite this undertaking some of their employees did in fact join the N. Union and in 1952 the plaintiffs determined the employment of one such employee. He thereupon appealed to his union for help who, in turn, sought help from other unions. In April, 1952, it came to the notice of the B. Co., who supplied paper under contract to the plaintiffs, that their loaders and drivers had expressed reluctance to load paper for the plaintiffs. Fearing trouble they consequently informed the plaintiffs that they were unable to make any more deliveries under their contract. None of the B. Co.'s employees actually terminated their employment. The plaintiffs thereupon sought an injunction against the appropriate officials of the N. Union and the other unions to which B. Co.'s employees belonged, to restrain them from procuring a breach of contract between the plaintiffs and B. Co., and they also applied

for an interlocutory injunction (*i.e.*, interim interdict) pending trial of the action. The officials of the N. Union asserted in sworn affidavits that they had merely asked for help from other unions, and nothing more, and the remaining defendants denied that they had given instructions to the men of their unions that they were not to handle or move paper intended for delivery to the plaintiffs. Both the judge of first instance and the Court of Appeal refused to grant the injunction. The plaintiffs were not in a position to prove knowledge by any of the defendants of the contract between themselves and B. Co., and the mere fact that the defendants' actions had the incidental result of interfering with the performance of a contract did not make these actions tortious. Jenkins L.J. summarised the essential facts which must be proved before the tort of inducing breach of contract can be established in this type of case: "But while admitting this form of actionable interference in principle, I would hold it strictly confined to cases where it is clearly shown, first, that the person charged with actionable interference knew of the existence of the contract and intended to procure its breach; secondly, that the person so charged did definitely and unequivocally persuade, induce or procure the employees concerned to break their contracts of employment with the intent I have mentioned; thirdly, that the employees so persuaded, induced or procured did in fact break their contracts of employment; and, fourthly that breach of the contract forming the alleged subject of interference ensued as a necessary consequence of the breaches by the employees concerned of their contracts of employment."

JOINT WRONGDOERS —Contribution— Wife a passenger when husband driving vehicle involved in collision.

The statuory right of relief between joint wrongdoers seems to be unjustly obviated where the injury to a plaintiff is caused both by the negligence of the defendant and the plaintiff's own spouse. The Law Reform (Married Women and Joint Tortfeasors) Act, 1935, s. 6 (*c*), anticipating the similar wording of the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, s. 3, provides that any wrongdoer liable in respect of any damage may recover contribution from any other wrongdoer *who is, or would if sued have been liable* in respect of the same damage; and it is a principle common to the laws of both

Scotland and England that spouses cannot sue each other in an action for tort. The effect of this principle on the statutory right of relief is that in the common accident case where a husband is driving his wife and collides with another motor car due partly to his own negligence, the driver of that other motor car when sued by the injured wife has no right of relief against her husband—*because the husband would not have been liable to her in an action of tort.* In the recent case of *Drinkwater* v. *Kimber* [1952] 2 Q.B. 281, where the facts were as above, an ingenious attempt was made to circumvent this inequity. The trial judge awarded £405 to the plaintiff wife and refused the defendant's counterclaim for an apportionment of damages between himself and the plaintiff husband. He also held that the defendant was two-thirds and the husband one-third to blame for the accident. The defendant then contended before the Court of Appeal that owing to the husband's negligence the defendant had himself suffered " damage " within the meaning of section 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, in having to pay £405 to the wife, and that there should accordingly still be an apportionment in terms of the 1945 instead of the 1935 Act. There was no proof of any actual physical damage to the defendant's person or his vehicle which might have otherwise made the husband directly liable to him for negligence. It was held, however, that as the defendant's liability only arose on the trial judge's judgment, he was not claiming " damage " within the proper meaning of the 1945 Act, and there could accordingly be no apportionment.

CONTRACT—Frustration—Uncontemplated turn of events not amounting to complete frustration.

In *British Movietonews, Ltd.* v. *London and District Cinemas, Ltd.* [1952] A.C. 166 the House of Lords has disapproved the decision of the Court of Appeal, [1951] 1 K.B. 190, that where an uncontemplated turn of events has occurred not amounting to complete frustration, the court has a discretion to qualify the contract for the purpose of doing what seems to it just and reasonable. The case involved the construction of a principal and a supplementary agreement for the supply of newsreels " during the continuance " of the Cinematograph Film

(Control) Order, 1943, which depended on Defence Regulation 55 and the Emergency Powers (Defence) Act, 1939. The exhibitors endeavoured to terminate the agreements on the ground that the Film (Control) Order was no longer " in continuance " when the statutory basis of Defence Regulation 55 was removed by the replacement of the Emergency Powers (Defence) Act, 1939, by the Supplies and Services (Transitional Powers) Act, 1945; or, alternatively, that the eventuality of the Film (Control) Order remaining in force for so long after the war was an event which was not contemplated by the parties when they entered into the contract. Reversing the judgment of Slade J. the Court of Appeal sustained the latter contention, and in a judgment prepared by Denning L.J. were of the novel opinion that where uncontemplated events have taken place the court can qualify a contract by altering its words to accord with the original scope of the contract. Denning L.J. emphasised that the principle to be applied was not based on a term implied by the parties but was a qualifying power of the court to do what was just and reasonable in the circumstances. The House of Lords reversed this decision and held that the exhibitors could not terminate the agreements, since, (1) on the true construction of the supplemental agreement, the references to the continuance of the Film (Control) Order could not be construed as referring to a period which ended when the statutory basis of Regulation 55 was altered, and (2) the restrictions on the consumption of raw film still continued and there had been no such vital change in the law operating in the circumstances as would terminate the agreement by frustration. The legal principle to be applied was clearly stated by Viscount Simon in the following terms: " It is of the utmost importance that the action of a court, when it decides that in view of a supervening situation the rights and obligations under a contract have automatically ceased, should not be misunderstood. The suggestion that an ' uncontemplated turn of events ' is enough to enable a court to substitute its notion of what is ' just and reasonable ' for the contract as it stands, even though there is no ' frustrating event,' appears to be likely to lead to some misunderstanding. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—

a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

BREACH OF STATUTORY DUTY BY WORKMAN—Contributory negligence.

The many statutes imposing duties on employers for the safety of their workmen frequently contain sections which also impose duties on the individual workman. When an accident occurs to a workman it can therefore become a nice point whether it may not have been caused or materially contributed to by his own failure to perform a statutory duty. Such a section is section 119 of the Factories Act, 1937, which inter alia provides that where any appliance is provided for the use of any workman he shall use that appliance. In *Norris* v. *Syndic Manufacturing Co.* [1952] 1 Q.B. 135 the plaintiff workman was injured while testing a power press from which he had previously removed the guard with his employers' acquiescence, though not on their express orders. The trial judge held that the defendant employers were liable for failure to guard the machine in terms of the Act, and for failure to provide a safe system at common law. He also acquitted the plaintiff of a breach of section 119 or of contributory negligence. On appeal, the Court of Appeal held that the words of section 119 imposed an absolute duty on the workman to use the guard once it was provided and was available for use, and the fact that the employers had acquiesced in its removal, although relevant in considering whether it was a proper case for a prosecution, and in determining whether the workman should bear part of the damages, did not enable it to be said that no offence had been committed by him. The workman was in breach of section 119 and the damages awarded were accordingly reduced by one-fifth.

DEPENDENT RELATIVE'S CLAIM FOR DAMAGES—Unable to claim remedy not open to deceased.

The case of *Stapley* v. *Gypsum Mines, Ltd.* [1952] 2 Q.B. 575 merits attention as illustrating the principle that a dependent relative suing an employer for damages on account of the death of a spouse cannot avail him or herself of remedies which would not have been open to the deceased if he had survived. In this case two miners D. and S. were told by their foreman to fetch down a piece of dangerous roof. After trying to do so they gave up the attempt and walked away. Shortly afterwards S. returned and, contrary to his implied instructions, recommenced ordinary work under the dangerous roof, which fell upon him and killed him. His widow subsequently brought an action against his employers for negligence at common law and breach of the Metalliferous Mines General Regulations, 1938 (as amended). Sellers J. gave judgment for the widow against the employers for one-half of the amount which S. would have been awarded if S. had not also been responsible for his own death. The Court of Appeal held that although the employers were themselves in breach of an absolute duty that the roof be made secure, nevertheless the death of S. was not due to that breach. Had S. suffered only personal injury he could not have asserted as against his employers that they were in breach of statutory duty, if the ground for the assertion was that S. and D. had neglected to do what they had been ordered to do; and S. having died, his widow could not now so assert under the Fatal Accidents Acts. The plaintiff also endeavoured to maintain the employers' liability on the ground that they were vicariously responsible for D.'s negligence or breach of statutory duty. The Court of Appeal also dismissed this contention on the ground that if S. had still been alive he could not have pointed to any negligence or breach of statutory duty on D.'s part which was not fully his own. Nor, therefore, when S. died, could his widow.

RECENT PRIVY COUNCIL CASES

Civil Air Transport, Incorporated v. *Central Air Transport Corporation* ([1952] 2 T.L.R. 621) was the appeal of Civil Air Transport, Incorporated, of Delaware, against the judgment of the Appeal Court of Hongkong affirming the judgment of Howe C.J. of the Supreme Court of Hongkong, who dismissed the appellants' claim for a declaration that 40 aircraft with associated equipment, lying on the Government airfield at Kai Tak, were the property of the appellants, and held that the ownership and right to possession of the aircraft were in the Central People's Government of China. At the end of August, 1949, the aircraft had been flown to Hongkong by personnel employed by the Nationalist Government of China which, at that time, His Majesty's Government recognised as the *de jure* Government of China. On December 12, 1949, while that Government was so recognised, two United States citizens, in partnership, bought from it the aircraft in question. The appellants bought the aircraft from that partnership. In the meantime the majority of the C. A. T. C. employees at Hongkong had defected from the Nationalist Government. The issue for decision was whether His Majesty's Government's recognition in January, 1950, of the previously existing Communist Government of China could affect the rights of the appellants. It was stated that the respondents were an emanation of the Chinese People's Government.

INTERNATIONAL LAW: Doctrine of retroactivity.

The appellants' argument before the trial judge was summarised as follows: (*a*) The Civil Air Transport Corporation (C. A. T. C.) were wholly owned and controlled by the Nationalist Government and there was a valid sale on December 12, 1949, by the Government to the partnership, a condition being that the partnership should organise a corporation to which the physical assets were to be transferred; (*b*) the partnership duly transferred the assets to the appellants by a sale valid in American law; (*c*) a change of Government was by succession and not by title paramount, and accordingly the Nationalist Government was empowered to enter into the transaction, being still recognised

as the *de jure* Government by His Majesty's Government, and the doctrine of retroactivity did not apply. The trial judge rejected that argument on two main grounds. The first (which was also adopted by the Full Court) was that the situation of the Nationalist Government on December 12, 1949, was such that it could not validly enter into such a sale, and that the terms of the purported sale were not terms which the Government could lawfully impose.

The Board stated that the policy of a Government in buying or selling chattels which it owned was not subject to the review of foreign tribunals, and whether its action in that regard was against the interests of those whom it was supposed to serve was a political question. The British courts could not take on themselves to pronounce whether a foreign Government, recognised by His Majesty's Government, was acting contrary to the interests of its people, and a Government was certainly not a trustee in these matters in any legal sense. The right in municipal law to follow property which was subject to a trust into the hands of third parties could have no application to the present case. It appeared to their Lordships that the view under the first head adopted by the trial judge and by the Full Court really was that on December 12, 1949, the Nationalist Government knew that it was on the point of being succeeded by a Communist Government, which would be recognised as the *de jure* Government of China, and that, without any regard to public interests, or to any injury which it was doing to the Chinese people, it got rid of the aeroplanes out of spite, merely to embarrass its inevitable successor. Such a view involved assumptions which their Lordships were not prepared to make. The trial judge claimed to found himself on a sentence, in *Boguslawski* v. *Gdynia-Ameryka Linie* (66 T.L.R. (Pt. 2) 596; [1951] 1 K.B. 162, at p. 182), occurring in a passage emphasising the paramount importance of the principle of continuity, that was, of a succeeding Government accepting what had been done by its predecessor. The sentence was not necessary for the decision in that case, and if the qualification which it introduced were to be read as authorising a court to treat as a nullity political decisions and actions of a former Government which had resulted in the transfer of property to third parties in circumstances like the present, their Lordships would respectfully disagree. At the same time they must not be

understood to reject the possibility of our courts' refusing, in a conceivable case, to recognise the validity of the disposal of State property by a Government on the eve of its fall, for example, by a despot, who knew that previous recognition was just being withdrawn, where it was clearly his purpose to abscond with the funds, or to make away with State assets for some private purpose.

The second ground on which the decision appealed against was based in the Hongkong courts (one of the judges dissenting) depended on the alleged retroactive effect of the recognition by His Majesty's Government of the Communist Government as the *de jure* Government of China as from January 5–6, 1950. That argument assumed that up to December 12, 1949, the aeroplanes were the disposable property of the Nationalist Government and that it validly transferred them as specific and ascertained goods by the contract of that date to the appellants' predecessors in title. On that assumption the appeal could fail only if the subsequent recognition *de jure* of the Communist Government annulled the passing of the property. Subsequent recognition of a *de jure* Government as the result of successful insurrection could, in certain cases, annul a sale of goods by a previous Government. But, primarily, retroactivity of recognition operated to validate acts of a *de facto* Government which had subsequently become the new *de jure* Government, and not to invalidate acts of the previous *de jure* Government. The actual question now to be answered concerned chattels, in the British Colony of Hongkong, which at the time of the sale belonged to the Nationalist Government. Whatever the degree of physical control which the defecting ex-employees maintained over the chattels, that control was in defiance of an injunction which the Supreme Court of Hongkong had granted on November 24. Moreover, if those persons could be regarded as acting on behalf of the *de facto* Communist Government, their action would be a direct infringement of the Representation of Foreign Powers (Control) Ordinance of November 4, 1949, and would be a criminal offence by the law of Hongkong. That ordinance provided that no person should " function on behalf of any foreign power " without the consent of the Governor, and " foreign power " was defined to include " the Government whether legal or *de facto* of any foreign State." The Governor gave no consent.

In such circumstances the action of those who illegally took control of the aeroplanes could not give ground for the principle of retroactivity. The appeal was accordingly allowed.

APPEAL FROM MEDICAL DISCIPLINARY COMMITTEE.

Daly v. *General Medical Council* ([1952] 2 T.L.R. 331) was the first appeal by a doctor to the Judicial Committee of the Privy Council under the Medical Act, 1950. The appeal was against a finding by the Medical Disciplinary Committee of the General Medical Council in November, 1951, that the appellant had been guilty of unprofessional conduct. The charge on which he had appeared before the disciplinary committee was that he had committed misconduct, of which he had been found guilty by a decree of the Divorce Court, with a woman with whom he had been in professional relationship. The disciplinary committee directed that his name should be erased from the Medical Register—failing entry of an appeal to the Privy Council. The appeal to the Board raised two problems: (*a*) as to the action of the legal assessor; and (*b*) as to the discretion of the Medical Council. As to the first, the Board's attention had been called to a number of rules giving the legal assessor wide powers. They must assume that, considering the evidence as presented, he had received the leave of the chairman to put the questions which he did, in which case they were entirely in order. Questions put against the wishes of the chairman would be out of order, but that was not the position in the present case. There was, therefore, no irregularity which could make a difference to the decision.

When the Medical Council were considering what action they should take, and whether the conduct of the appellant amounted to infamous conduct, it was for them to receive not only the evidence in this particular case, but evidence as to the previous position of the doctor concerned. They were entitled to, and must, take that into consideration when they were making up their minds whether, in the first place, they should find him guilty of infamous conduct; and, in the second place, what action they should take on that conduct. In a particular case, therefore, they were entitled to hear not only evidence of the surrounding circumstances, but also of the previous complaints and findings with regard to the doctor in question. In the view of the Board

it was not true to say that in a medical case only circumstances of the same kind must be looked at. How much the other circumstances, which were medical circumstances, might affect the mind of the Medical Council was a matter for them in their discretion. In the present case their Lordships could not say that the Medical Council had acted in any way improperly, or without evidence or had not had ample ground on which to exercise their discretion. The appeal was accordingly dismissed.

CEYLON: Registration as citizens.

Wirasinha, Commissioner for the Registration of Indian and Pakistani Residents, Colombo v. *Cader Badurdeen*; *Same* v. *Abdul Cader* ([1952] 2 T.L.R. 610) were two appeals, heard together, from two decrees of the Supreme Court of Ceylon, which had allowed appeals from two orders, dated July 7, 1950, of the appellant whereby he refused the respondents' application for registration as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act, 1949. That Act provided for the granting to Indian and Pakistani residents in Ceylon the status of citizens of Ceylon by registration, on the conditions and in the manner which the Act provided. Section 6 (2) (ii) required an applicant to produce sufficient evidence to satisfy the Commissioner " where the applicant is a male married person . . . that his wife has been ordinarily resident in Ceylon, and in addition that each minor child dependent on him was ordinarily resident in Ceylon while being so dependent." The appellant held that the requirements of that subsection were not satisfied unless (*a*) the wife of an applicant had been resident in Ceylon from the date of her marriage, or from January 1, 1939, whichever was the later, and (*b*) each minor child had been so resident from January 1, 1939, or the date of the birth, whichever was the later. The Supreme Court of Ceylon reversed his decision.

The questions raised in the two appeals were identical in principle—namely, whether an applicant who was a married man permanently settled in Ceylon, who applied under the Act of 1949 for registration as a citizen of Ceylon, could be so registered although his wife, though ordinarily resident in Ceylon at the date of his application, had not been so resident for the seven years before January 1, 1946, nor at all times since their marriage, and

his minor children had not been ordinarily resident in Ceylon during the whole period of their dependency on the applicant. In the first appeal the applicant's wife had been ordinarily resident with the applicant for a period of one year and eight months before the date of his application (on November 19, 1949) and was so resident at the date of his application, and his minor children had been ordinarily resident in Ceylon with him since March, 1948, but had been dependent on him since their birth. In the second appeal the period of the wife's ordinary residence in Ceylon was one year and eleven months before her husband's application dated November 15, 1949, and the period of the minor children's ordinary residence in Ceylon was for the same length of time, but they had been dependent on him since their birth.

Before the Board it was contended for the appellant, first, that, having regard to the definition of Indian and Pakistani resident in section 22 of the Act of 1949, and the regulations which required an applicant to state the period of ordinary residence in Ceylon of the applicant's wife and minor children since January 1, 1939, the general policy of the Act must be taken to be that only applicants who had permanently settled with their families in Ceylon could apply for citizenship. Section 22 provided that an Indian and Pakistani resident meant " a person—(*a*) whose origin was in any territory which, immediately prior to the passing of the Indian Independence Act, 1947, of the Parliament of the United Kingdom, formed part of British India or any Indian State, and (*b*) who has emigrated therefrom and permanently settled in Ceylon, and includes a descendant of any such person." It was secondly argued for the appellant that the general policy of the Act, referred to above, was carried out in section 6 (2) (ii) by the provision that the wife of a married applicant must have been ordinarily resident in Ceylon and that the minor children must have been ordinarily resident while dependent on the applicant, and therefore that a male married applicant otherwise qualified could not be registered unless his wife had ordinarily resided in Ceylon from the date of her marriage, or since January 1, 1939, and unless his minor children had been ordinarily resident in Ceylon since the date of their births during the whole period of their dependency on the applicant.

The Board were unable to accept those contentions. They said that the mere reference to the date January 1, 1939, in the form prescribed by the regulations requiring a statement by the applicant as to the period of ordinary residence in Ceylon of his wife and dependent children from that date or from the date of the marriage or of the birth, as the case might be, did not make it necessary or proper to read into section 6 (2) (ii) a provision that the applicant's wife must have been ordinarily resident since that date. The date to which that subsection most naturally referred was the date of the application, and the past tense " has been ordinarily resident " was quite appropriate when speaking of residence at a particular date. It would be an extraordinary provision that the husband should have to prove, for his own registration, that his wife had been ordinarily resident in Ceylon for a longer period than it was necessary to prove in applying for his wife's registration (see section 4 (2) (*a*)). The Act contained no express provision that the husband's permanent settlement in Ceylon must have been achieved in company with his wife and children, or that the minimum period of uninterrupted residence required for the husband had any application to his wife and children. The appeals were accordingly dismissed.

REDEMPTION OF STOCK: Currency.

National Bank of Australasia, Ltd. v. *Scottish Union and National Insurance Co., Ltd. and Others* ([1952] 2 T.L.R. 254) was an appeal from an order of the High Court of Australia which varied the answers given by an order of the Supreme Court of Queensland to certain questions arising in the voluntary liquidation of the Queensland National Bank, Ltd. (referred to as " the bank "), consequent on the appellant, the National Bank of Australasia, Ltd., acquiring all the shares of the Queensland National Bank. The questions related to the currency in which various classes of creditors of the bank, who at the date of its liquidation were the holders of interminable inscribed deposit stock, registered in Australia or in England, were entitled to be paid. In 1897, pursuant to a scheme of arrangement with its creditors, the bank issued the stock referred to above, which the registered holders of then existing securities of the bank—which had arisen from deposits made either in London or in Australia—accepted in satisfaction and discharge of those

securities. By the scheme registers of the stock were kept in Australia and in London, and the holder of stock was entitled at his option to have it transferred from one register to another. The scheme provided that the principal moneys were to become immediately payable in the event, inter alia, of the bank's being wound up. In 1947 the appellant became the holder, either in its own name or in the name of nominees, of all the shares in the bank, and thereafter the bank was placed into voluntary liquidation. As a result of that liquidation the principal moneys referred to became payable, and the liquidator was faced with the question as to the amounts in Australian pounds for which he should admit proofs in the liquidation in respect of the principal moneys; that was, whether on redemption of the stock the bank's liability was for the nominal face value of the stock in English or in Australian pounds, or partly in one currency and partly in the other.

The Board held that, having regard to the scheme as a whole, the liability of the bank in respect of the stock was for a fixed amount in Australian pounds, and that the bank's liability—the stock—was and always had been limited to paying to each registered holder, on the principal moneys becoming repayable, Australian pounds equal to the nominal value of the stock which he held, and in the meantime paying in Australian pounds interest on the said principal moneys at the rate of 3½ per cent. per annum. The Board further stated that, in view of the right to transfer from register to register, the facts were essentially different from those which existed in *Adelaide Electric Supply Co.* v. *Prudential Assurance Co., Ltd.* (50 T.L.R. 147; [1934] A.C. 122), and that the present case was more like *Auckland Corporation* v. *Alliance Assurance Co., Ltd.* (53 T.L.R. 347; [1937] A.C. 587) and *Bonython* v. *Commonwealth of Australia* (66 T.L.R. (Pt. 2) 969; [1951] A.C. 201). The order of the High Court was accordingly set aside.

CURRENT PERIODICAL LITERATURE

By K. W. B. Middleton, b.a., ll.b., Advocate

DOMESTIC TRIBUNALS

Courts of law are slow to interfere with the internal discipline of voluntary organisations, whether they be clubs or professional or semi-professional bodies or trade unions. There are certain requirements that are insisted upon, at any rate where a patrimonial interest is involved. Thus the rules of the society must be complied with, since they form the terms of the contract between the members, and the decision of the domestic tribunal must not be vitiated by bad faith. But the courts will not, it is generally agreed, grant a remedy to a member who is aggrieved merely because they disagree with the grounds of the decision or because the procedure adopted was not strictly judicial. It would appear that the attitude of the courts is similar to that which they have adopted in Scotland towards arbitration proceedings. An arbiter is bound not to step *extra fines compromissi* and must come to his decision in good faith and in accordance with the principles of natural justice. But otherwise he is free to decide questions of fact or of law as he thinks fit. The matter was succinctly stated in an old case as follows: "We are not entitled to set aside the award of an arbiter pronounced under an error of judgment, however palpable the error may be; but if any failure in duty has been committed, distinct from an error in judgment, the award cannot stand."[1] Hitherto the same principle has seemed to be applicable to the decisions of domestic (that is, non-statutory) tribunals, and in this respect, though not as regards arbitration proceedings, the law in England has coincided with the law established in Scotland. But a recent decision of the Court of Appeal, *Lee* v. *Showmen's Guild of Great Britain*,[2] raises some doubts.

In *Lee's Case* the plaintiff had a dispute with another member of the guild, a registered trade union formed to protect the interests of showmen visiting fairs, about the occupation of a site which had been assigned to the other member by a previous decision of the guild, but which the local authority allocated to the plaintiff. The rules of the guild contained a provision prohibiting members from indulging in "unfair competition with regard to the renting, letting or taking of ground or position." Complaint was made to the committee of the guild, which was empowered by the rules to impose fines and in case of non-payment of a fine to expel the member concerned. The committee, after hearing the parties, found the plaintiff guilty of unfair competition and on his refusal to pay the fine imposed he was expelled. Ormerod J. held that, while there had been no bad faith or contravention of natural justice on the part of the committee, the

[1] *Mitchell* v. *Cable*, 1848, 10 D. 1297, *per* Lord Mackenzie at p. 1307; approved in *Robson* v. *Menzies*, 1913 S.C. (J.) 90, *per* Lord President Dunedin at p. 95.

[2] [1952] 1 All E.R. 1175.

acts complained of could not reasonably be regarded as unfair competition, and therefore that the fine and expulsion were *ultra vires* of the committee and void. On appeal the judgment was affirmed by a court consisting of Somervell, Denning and Romer L.JJ.

It may be that the committee of the guild were in error in characterising as unfair competition what had been done by the plaintiff, and no doubt the particular rule of the guild under which they decided against him was so expressed as to invite rather than discourage judicial intervention. But, granted that the meaning of the term "unfair competition" was incorrectly interpreted by the committee, is it possible to say that their interpretation was one that no reasonable person would have adopted? After all, "unfair competition" is an elastic term about which showmen may conceivably have different views from lawyers or even from business men in general. There may be instances where a domestic tribunal adopts so arbitrary an interpretation of a rule that it is evidence of bad faith on their part, but the honesty of this particular decision was not questioned. If the proper test is that laid down in *Mitchell* v. *Cable*, namely, whether the committee failed in their duty, not whether they made an error in judgment, then it is plain that the decision was not one that the court should have overturned. "I am alive," said Somervell L.J., "to the principle reiterated more than once that this court cannot be made a court of appeal" from decisions of domestic tribunals. Yet this is just what the court appears to have made itself in *Lee's Case*. If the case was rightly decided, it means that domestic tribunals, at least unless the rules are carefully framed, are no longer final on questions of law or mixed fact and law, but only on questions of pure fact, however conscientiously they have followed the procedural rules of the society and observed the principles of natural justice.

In an article on the subject of expulsion of members by domestic tribunals in the *Modern Law Review* for October, 1952, Mr. Dennis Lloyd remarks that *Lee* v. *Showmen's Guild* would appear to be the first reported decision where the validity of an expulsion has turned directly on the construction of a substantive rule, and that it is only in exceptional cases that the basis of this decision will afford a remedy to an expelled member. Normally the finding of a tribunal on an issue of misconduct will be one of fact and opinion, matters which the courts will, he thinks, probably still regard as primarily objective and within the exclusive province of the tribunal. That is indeed possible, but would perhaps be a safer prophecy if the decision of the Court of Appeal had turned wholly on the wording of the rule under construction, that is to say its omission to state that the committee of the guild had the right to decide what constituted unfair competition. It is far from clear, however, that the decision proceeded on this narrow basis. Mr. Lloyd finds it difficult to see why, since it has always been held that there must be strict compliance with the procedural rules of a society, the courts should not also insist on compliance with the substantive rules. But the issue here was what the substantive rules meant, not whether the substantive rules had been complied with. There is a distinction of capital importance between the intervention of a court of law in order to interpret the procedural rules of a society

and its intervention in order to interpret the substantive rules. The former goes to jurisdiction and competency, while the latter goes to merits.

All the judges in the Court of Appeal emphasised the drastic nature of the power of expulsion exercised by domestic tribunals sitting in judgment on members of a professional organisation or a trade union: "They wield powers as great, if not greater, than any exercised by courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of their rules, which, be it noted, are rules which they impose and which he has no real opportunity of accepting or rejecting. In theory their powers are based on contract. The man is supposed to have contracted to give them these great powers, but in practice he has no choice in the matter. . . . A man's right to work is just as important, if not more important, to him than his rights of property. These courts intervene every day to protect rights of property. They must also intervene to protect the right to work." [3] These considerations are weighty, and they go a long way to explain why a decision like that in *Lee* v. *Showmen's Guild* comes to be made. But it is open to debate whether courts of law are the proper tribunals to deal with the merits of these cases on appeal, or whether it is desirable that accepted rules of law should be stretched because it is thought that the consequences of error on the part of a domestic tribunal are so grave.

Lee v. *Showmen's Guild* is an important case not only for what it decided, but for the *obiter dicta* to be found in the judgments. Thus Denning L.J. expressed the view that the jurisdiction of a domestic tribunal is subject to limitations imposed by public policy. Natural justice must be observed and cannot be excluded by the rules of the society. There is good ground, however, for the contrary view that an express rule permitting an organisation to expel at its absolute discretion is valid in spite of the principle of natural justice which declares that a man should not be condemned unheard.[4] Again, both Denning and Romer L.JJ. were of opinion that public policy would not permit a member to be denied access to the courts by a provision giving a society a final and conclusive power of interpreting the rules. The society, or its committee, might be made the final arbiter on questions of fact, but not on questions of law. The distinction, however, between fact and law is not an easy one to draw, and as the history, for example, of the Workmen's Compensation Acts shows, to give an appeal on a question of law means to a large extent to give an appeal on the merits. The law cannot usually be laid down without applying it to the facts.

It is not clear on what ground a provision excluding the jurisdiction of the courts can be said, in virtue of any rule of general application, to be contrary to public policy. Such a rule may exist in English law, but it is certainly not recognised by Scots law. The courts in England have refused to allow an arbitrator, even with the express consent of the parties, to have the last word on matters of

[3] Denning L.J. at p. 1181.

[4] See *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109.

law. And in a recent case [5] Danckwerts J. held that a clause in a will, giving executors power to determine all doubtful questions and declaring that every such determination shall be conclusive and binding upon all persons interested, was invalid as being contrary to public policy. This latter decision has not been favourably received by writers in legal periodicals. An editorial note in the *Law Quarterly Review*, of April, 1952, asks why, except on the view that it is sad to see a fine estate frittered away among the beneficiaries, a testator should not be entitled to make some provision giving final authority to his executors. As for the general rule against ousting the jurisdiction of the courts, surely it is in the public interest that disputes should be settled as amicably as possible. The unkind remark is made that the principle may owe its origin to the desire of the various courts, at a time when remuneration depended on the amount of litigation, to extend their jurisdiction as widely as possible. Nowadays it is difficult to find any justification whatsoever for the rule. Mr. J. D. B. Mitchell, writing in the *Modern Law Review* for October, 1952, is also critical of *Re Wynn's Will Trusts*, and suggests that the true limit of public policy is the prevention of fraud.

Re Wynn's Will Trusts was cited with approval by Denning and Romer L.JJ. in *Lee* v. *Showmen's Guild*. But in Scotland the case would have been decided the other way, as appears from *Dundee General Hospitals* v. *Bell's Trustees*.[6] Thus Lord Normand [7] was of opinion that a testator could, to the exclusion of the courts, validly commit to his trustees the construction both of his will and, incidentally, of the meaning and effect of a statute, and Lord Reid [8] agreed that a testator could make his trustees the sole judges of a question. At the same time, Lord Reid pointed out that by doing so a testator did not entirely prevent recourse to the courts. If it could be shown that the trustees considered the wrong question or perversely shut their eyes to the facts or did not act honestly or in good faith the courts could intervene. It does not follow, indeed, because Scots law is prepared to allow trustees, like arbiters, to make mistakes in law without possibility of redress, that Scottish courts must adopt the same attitude to domestic tribunals. But it is scarcely likely that the opinions expressed in *Lee* v. *Showmen's Guild* will secure complete approval on this side of the Tweed.

Discussing *Lee's Case* in the *Canadian Bar Review* for June-July, 1952, Professor Whitmore considers that it is difficult to reconcile the approach of the judges in the Court of Appeal, or at any rate of Denning L.J., with the implications of *Kuzych* v. *White*.[9] This was a Canadian appeal in which it was held by the Privy Council that, even where the expulsion proceedings are tinted by bias and absence of natural justice, a trade unionist who has been expelled from his union can be prevented by appropriate provisions in the constitution of the union from resorting to the courts unless and until he has appealed to a domestic appeal tribunal in accordance with the rules.

[5] *Re Wynn's Will Trusts* [1952] 1 All E.R. 341.
[6] 1952 S.L.T. 270.
[7] At p. 272.
[8] At p. 275.
[9] [1951] 2 All E.R. 435.

The Privy Council refused to read the constitution as if it were impliedly subject to the qualifications that a lawyer would presume in considering whether the decision of an inferior tribunal is free from attack, and they declined to reach the same result by applying an overriding principle of public policy which, while not affecting the interpretation of the constitution, would enable the plaintiff to escape from its restrictions.

THE STEEL SEIZURE CASE

The recent case of *Youngstown Sheet and Tube Co.* v. *Sawyer*, decided by the United States Supreme Court, makes all the cases before British courts of law this year, or any year, look rather small. The issue, writes Professor Bernard Schwartz in the *Canadian Bar Review* for May, 1952, was " as important as any ever decided by the American courts under their authority as arbiters of constitutional disputes. The question was one that had never before been authoritatively determined by the American judiciary, although it is one that is fundamental in modern government. It is the question of the extent of inherent executive power—and that is as important in other countries as it is under the American constitutional system." It might be added that politically the case was, of course, a sensational episode of a kind that is unknown in our experience of legal disputes. On April 8, the day before a threatened strike in the American steel industry was due to begin, President Truman directed the Secretary of Commerce to take possession of and operate most of the American steel mills, on the ground that the proposed stoppage of production would jeopardise the national defence. The steel companies at once brought proceedings in the Federal District Court against the Secretary of Commerce to restrain him from carrying into effect the President's seizure order. The judge of first instance decided that the executive order was illegal, and his decision, which was taken direct to the Supreme Court, by-passing the Circuit Court of Appeals, was affirmed by a majority of six to three.

The argument advanced for the defendant was that in the emergency arising from the Korean war it was essential that a stoppage in the steel mills should be averted, and that the President was entitled to take the necessary action, by virtue of his constitutional powers in general, and more especially in his capacity either as commander-in-chief of the armed forces or as head of the executive, having the duty under the Constitution " to take care that the laws be faithfully executed." The Supreme Court, however, held that, however liberally it might be possible to construe the President's constitutional functions as head of the armed forces when turned against the outside world in the interests of national security, there was an essential distinction when they were turned inwards, and not because of rebellion, but because of a lawful economic struggle between industry and labour. " The Constitution did not contemplate that the title commander-in-chief of the army and navy would constitute him also commander-in-chief of the country, its industries and its inhabitants." Nor could the seizure of the steel mills be justified by the President's power and duty to see to the faithful execution of the laws. The lawmaking

power lay in Congress alone, and there was no Congressional enactment that expressly or impliedly authorised the President to issue the order complained of.

In spite of the resounding language of the majority judgments it would probably be a mistake to read too much into them. What the Supreme Court decided was that the President cannot take possession of private property in order to prevent production being affected by a labour dispute without Congressional authority and in the absence of a formal state of war. If there had been some implied grant of authority by the legislature or if a formal state of war, which requires Congressional action, had been declared, the decision would no doubt have been different. In wartime, Professor Schwartz points out, executive acts are taken in execution of the declaration of war enacted by the legislature. The importance of the decision lies in the blow which it delivers at the influential theory of inherent executive powers, according to which a vast and undefined range of powers may be exercised by the President, whether or not in cases of emergency, on his own initiative and responsibility, limited only by specific restrictions and prohibitions mentioned in the Constitution or imposed by Congress acting within its sphere of jurisdiction.

It is apparent that, however interesting as an assertion of the supremacy of law over executive discretion, the case has no direct application to countries having a parliamentary system of government as opposed to the American system, in which the executive is almost entirely independent of control by the legislature. Professor Schwartz remarks on the contrast between the approach exemplified by the Supreme Court in the steel seizure case and the approach of the House of Lords in *Liversidge* v. *Anderson*,[10] which amounted, he says, to a complete preclusion of any judicial control over the legality of executive action. "It is the existence of judicial control over exercises of executive authority that minimises the danger of 'government by decree' in the United States, such as that which has occurred so often in countries where the judicial safeguard has been absent." In *Liversidge* v. *Anderson*, the House of Lords decided that the Home Secretary could not be compelled to disclose the grounds on which he detained a person whom he believed to be of hostile associations under what Professor Schwartz calls the notorious Regulation 18B. But in doing so they were only construing, correctly or not, a particular regulation made in pursuance of powers granted by Parliament. They were not surrendering the right of the courts to inquire into the legality of executive actions. Otherwise they would have declined to listen to the arguments put forward on behalf of Liversidge altogether. When Professor Schwartz says that the decision in *Liversidge* v. *Anderson* "renders executive emergency action immune from judicial control" he is making a statement that would be seriously misleading if it were addressed to an American audience, and not to a Canadian one, which knows the true facts. It ought perhaps to be admitted, however, that there are few cases which have given rise to more loose talk in this country than *Liversidge* v. *Anderson*. Possibly our courts are sometimes too slow to assert their jurisdiction over executive acts, but the real source of their weakness, if that charge is

[10] [1942] A.C. 206.

justifiable, when it is a question of protecting the individual from governmental despotism comes from the doctrine of parliamentary sovereignty, which allows judges to interpret but not to question Acts of Parliament. If Parliament gives the executive too much scope it is Parliament's fault, not that of the courts, which are always ready at any rate to examine the legality of executive proceedings. And if Parliament is too subservient to the executive, that is the fault of the party system and of the voters who vote for parties instead of for men. On the other hand, the independent authority of the executive in the United States is so wide that if it were not subject to judicial control, as well as to such control as Congress can exercise over it, it would no doubt be dangerously irresponsible. The Supreme Court has done nothing by its decision in the steel seizure case to make more difficult a combination of executive and legislature against the rights and liberties of the individual citizen. What it has done is to redress the balance of power between the President and Congress, to some extent, in favour of the latter. Of course, the very existence of this balance of power is an advantage to the individual. It is a pity that there is so little sign of it here.

Periodicals also received: *The Canadian Bar Review*, *Revue Internationale de Droit Comparé*, *New York University Law Review*, *The Modern Law Review*, *The Western Political Quarterly*, *The International and Comparative Law Quarterly*, *The Law Quarterly Review*, *Italian Affairs*, *The Statist*, *The American Journal of International Law*, *La Justicia* (Mexico), *Revista General de Derecho* (Valencia), *Oklahoma Law Review*, *Revista Del Foro* (Lima), *Connecticut Bar Journal*, *Boletín de la Biblioteca del Colegio de Abogados de Lima*, *Revista Jurídica de la Universidad de Puerto Rico*, *The Medico-Legal Journal*, *Textes Législatifs Étrangers* (Brussels), *Documentation Juridique Étrangère* (Brussels).

RECENT LITERATURE

Coulson and Forbes on the Law of Waters, Sea, Tidal and Inland, and Land Drainage. Sixth Edition. By S. Reginald Hobday, O.B.E. 1952. London: Sweet & Maxwell, Ltd. Price £8 8s. net.

This book covers a wide field, dealing with waters of every kind, the sea, the foreshore, tidal waters, inland waters, canals, docks, fisheries, and the whole law of inland drainage. Much of it deals with matters peculiar to the law of England but on many other topics it may be consulted with advantage in supplement of *Rankine on Landownership* and *Ferguson on Water*. There is moreover substantial reliance on Scottish authority on many points, though the citations require checking in a subsequent edition, as at present they form the most notable blemishes in an otherwise valuable repository of information. Thus at p. 18, note (*g*) Lord Sands has become "Dands"; at p. 113, note (*c*) "Macph" should be "5 Macph," and the reference to *Campbell* v. *Brown* is not understood: it should be "18 Nov. 1813, F.C.," and is to be found at p. 444 of Volume 17 of these reports; at p. 120, note (*d*) the Morison of the Dictionary has only one "r"; throughout, *Mortensen* v. *Peters* should be 8 Fraser (J) 93 and not merely 8 Fraser.

On the other hand the book scrupulously mentions when Acts cited apply to Scotland and there is a valuable list of Scottish fishery Acts. The Scot should also be aware of the valuable information herein on the Coast Protection Act, 1949, on questions of river pollution, and on the present position of canals, harbours and docks.

This edition is the first for 19 years and it has taken account of the very great statutory changes introduced in that period. Certain of the more important statutes and orders are printed in the Appendix. Apart from that there has been a substantial revision of the text to bring it up to date, and there seems to be nothing within its scope which has escaped the editor.

D. M. Walker.

The International Law of the Sea (Higgins and Colombos). Second Edition revised by C. John Colombos, LL.D. 1951. London: Longmans, Green & Co., Ltd. Price 50s. net.

The first edition of this book appeared in 1943, thereafter it underwent reprinting in 1943 and 1947, and now a second edition appears revised by Dr. Colombos, the survivor of the original team of Higgins and Colombos. These facts speak eloquently of the esteem which this, comparatively small, work enjoys, for within its 655 pages of text are to be found no fewer than 22 ably-written and well-documented chapters. The twenty-second is new; headed "The Future Rules of Naval Warfare" it belies its title by

discussing in general the need for " the leading democratic powers " to have command of the seas, and deals in particular with the attainment of this end under the Charter of UNO and the North Atlantic Treaty. It concludes with a statement of the author's belief that the civilised nations " are slowly, but surely, moving towards the realisation of the fact that a properly organised International Society requires for its regular functioning" an effective international executive body, a sovereign international legislative body, and an international Court of Justice enjoying compulsory jurisdiction. That may well be, even although present trends may not appear to justify Dr. Colombos' prediction, but it is permissible to ask what relevance this conclusion has to " the future rules of naval warfare "?

Elsewhere the keynote of the book is thoroughness and the treatment sober and realistic. In view of the revival of doubts, in some quarters, as to the validity of the attempt of the War Crimes Commissions to strip the pleas of " operational necessity " and " superior orders " of much of their sanctity, it is regrettable that the learned editor did not devote more space to this topic. But that is a minor defect. All in all the work is a mine of information, lucidly conveyed and agreeably presented. What cannot be found in the text may be found in the voluminous references and the sources to which they point.

J. J. Gow.

Israel's Armistice Agreements with the Arab States. By Shabtai Rosenne. 1951. Tel Aviv : Blomstein's Bookstores, Ltd., for the International Law Association, Israel Branch.

This monograph is the consequence of a lecture delivered by Mr. Shabtai Rosenne, Legal Adviser to the Israel Ministry for Foreign Affairs. It is described as a " juridical interpretation " or, as the author observes in the introduction, its purpose is " to subject the various armistice negotiations and agreements and their attendant circumstances to a juridical analysis in an endeavour to find their proper place both in general international law and in the particular law of the United Nations." The question, Why? receives the general answer—because of the unprecedented and almost Gilbertian circumstances which formed the backcloth to the stage on which was waged the Israel-Arab struggle. There were military operations but no " war," and these operations " petered " out before any agreements between Israel and her adversaries were entered into. There could not, therefore, be an armistice in the traditional sense, because an armistice presupposes a " juridical " state of war, and takes place whilst the state of war to which it refers still exists and continues to exist. For that reason the " armistice agreements " dealt with in this monograph cannot be considered as armistices in the traditional sense. What are they then? They are, according to the author, much more, for they effectively prohibit further recourse to arms, and ensure that the relations of the parties are to be governed by agreement. And so, the author concludes, " Under this conception the armistice does not consist of a subtraction from the fullness of the laws of war. It is the

foundation upon which, in the course of time, is to be erected a state of affairs which, if it is not the full and complete condition of peace normally found between independent nations, will at any rate not be a state of affairs in which the threat or use of force will be an element in the mutual relations of the parties." To this generalisation a sceptic might add a respectful *sed quaere*.

Yet that conclusion embodies the point of this monograph that whatever name might be given to the military operations between Israel and the Arab States, one thing is clear that the parties to the agreements when they concluded them signed away all pretence to the exercise of belligerent rights. There may not be a state of peace between Israel and her adversaries, but emphatically, in law at least, there is not a state of war. The argument is presented with care and candour. The work well merits study.

J. J. Gow.

The Law of Agency. By Raphael Powell, M.A., B.C.L.(oxon). 1952. London : Sir Isaac Pitman & Sons, Ltd. Price 40s. net.

The house of Pitman has long been renowned for the production of authoritative works on commercial law, and this book is no exception. The publishers are to be congratulated on its attractive presentation in print and general lay-out, the author on an attractive and persuasive style. Mr. Powell and dogmatism are strangers; indeed if he errs at all it is perhaps in an unwillingness to be dogmatic.

All would agree that no exposition of the law of agency would be adequate which omitted a satisfactory definition of an agent; it is surprising therefore to find that this omission bulks large in many of the better-known treatises on Scots law. *Gloag* never mentions it, *Bell's Principles* ignore it, and even the erudite Lord M'Laren in his editing of the *Commentaries* passes over this thorny problem. The reason is obvious. All were concerned to discuss and analyse the legal relationship between principal and agent and assumed that the concept of agent was well and easily understood. Mr. Powell makes no assumption, and the consequence is that the first 30 pages of this book are devoted to canvassing the question—Who is an agent? It is a question much easier to ask than to answer. For example *Halsbury's Laws of England*, 2nd ed., Vol. I, 93, declares " An agent is to be distinguished on the one hand from a servant and on the other from an " independent contractor," whereas the American *Restatement* declares that agents are either servants or " independent contractors." Mr. Powell disagrees with both and maintains "(a) some servants may be agents; (b) some independent contractors may be agents; (c) some agents are neither servants nor independent contractors." It may be asked—Does it really matter, provided that in a given case the label of agent can be attached or not? But that is to beg the question to which an answer is sought. If the issue is the liability of a principal, it may be of great moment to determine whether there is agency, who is an agent, and whether he is *sui generis*, a servant, or an independent contractor. An interesting by-product of the author's analysis is a convincing refutation of the adequacy

and validity of the distinction between *locatio operis* and *locatio operarum* as the test of vicarious liability.

The author examines the rule, often considered trite law, that an undisclosed principal may sue on the contract between agent and third party. *Gloag* (at p. 128) submits that the rule is only applicable where the contract is assignable. If this is taken to mean that the principal is an implied assignee (which we are informed is the conclusion reached by such eminent authorities as Dr. A. L. Goodhart and Mr. C. J. Hamson) Mr. Powell convincingly demonstrates that this test will not and cannot suffice, and, strangely enough, his argument is based on data almost indistinguishable from that relied on by *Gloag*. *Gloag* supports his submission by reference to *Salton* v. *Clydesdale Bank*, 1898, 1 F. 110, where it was held that the pursuer could not rely on a communication made by the defenders to a third party ostensibly acting on his own behalf, but, in reality, acting for the pursuer. Similarly in the English case of *Collins* v. *Associated Greyhound Racecourses, Ltd.* [1930] 1 Ch. 1, it was held that the plaintiff could not rescind a contract on the ground of misrepresentations made to third parties who entered into the contract ostensibly as principals, but in truth as his agents. This is but one of the many problems the lucid discussion of which makes this work interesting and profitable.

This review would not be complete without reference to the obvious truth implicit in a sentence in the author's preface. Mr. Powell observes "I have always felt that the perfect book on Agency—and this book is far from perfection—could never be written by one man, however versatile he might be." The moral is that agency, quasi-delict, contract and the like are not water-tight compartments, but technical conveniences, and to a knowledge of the one knowledge of the others is indispensable. He who would be a knowing lawyer must take all law for his province.

J. J. Gow.

The Law of Nations—Cases, Documents, Notes. Second Edition. By Herbert W. Briggs. 1952. New York : Appleton-Century-Crofts, Inc. Price $8.00 net.

When Grotius wrote his *De Jure Belli ac Pacis* he was breaking virgin soil, consequently his method was deductive and his raw material *a priori* first principles. For the international lawyer these happy days are gone; his difficulty is not paucity but superabundance of material. This change has begun to reflect itself in the teaching of the subject. Once upon a time it would have been enough for the teacher to teach, and the student to learn, a highly condensed *Wheaton* or *Oppenheim*.

Today that will not do, the inductive method is upon us, and he who professes to know international law must go beyond the textbooks and treatises, and, no doubt using them as invaluable guides, examine the raw material for himself. This change both in teaching and in learning is illustrated by the work being done in London by Dr. G. Schwarzenberger who professes to apply systematically the inductive

method, and whose treatise *International Law* claims to be a product of that method. Of course, for the student at least, the inductive method is a counsel of perfection which he cannot hope to follow *au pied de la lettre*. Inevitably, therefore, he must be supplied with selected raw material, and the chosen vessel is the case-book. A recent example in this country is *International Law through the Cases* by Mr. L. C. Green. The work under review is an American analogue, but more ambitious.

Professor Briggs' *credo* is found in his preface, where he declares that the basic training of the international lawyer consists in the juridical analysis of the decisions of international tribunals and of national courts, the texts of treaties of diplomatic papers, and of relevant national legislation. No mean task indeed! To assist the student in attempting that task is the wherefore of Professor Briggs' book.

Professor Briggs' method is to divide his subject-matter into chapters under well-known and traditional headings, *e.g.*, "Recognition of States and Governments," to break down each chapter into more manageable and specific parts, *e.g.*, "recognition practice and theory," and to group thereunder the "raw material" which he considers apposite. Where necessary he adds editorial comments which, in this reviewer's humble opinion, are more than half the value of the book. Thus the comment on *Mortensen* v. *Peters*, 8 F.(J.) 93, is invaluable. Without it the case would have little meaning for the reader who was unaware of its historical and political setting. Not that the work is a case-book *simpliciter*. Cases are merely part of the "raw material." There are included statutes, conventions, treaties, international and national regulations, and even, in the Appendix, the Covenant of the League of Nations, the Charter of the United Nations, and the Statute of the International Court of Justice. The result is not just a manual or a case-book, but a *vade mecum* which, if prefaced by a reading of such a work as Brierly's *The Law of Nations*, must prove an invaluable and interesting guide to and through the labyrinth of international law.

J. J. Gow.

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